Court File No. A-407-14

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA and
MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

-and-

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH

Respondents

MOTION RECORD OF THE PROPOSED INTERVENERS: CCPI/CHC

Motion for Leave to Intervene brought by Charter Committee on Poverty Issues ("CCPI") and the Canada Health Coalition ("CHC")

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MOTION RECORD

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NOTICE OF MOTION

Motion for Leave to Intervene brought by Charter Committee on Poverty Issues (CCPI) and the Canada Health Coalition (CHC)

TAKE NOTICE THAT the Charter Committee on Poverty Issues ("CCPI") and the Canada Health Coalition ("CHC") (together, "CCPI/CHC") will make a motion to the Court in writing under Rules 109 and 369 of the *Federal Courts Rules.*

THE MOTION IS FOR an Order that:

1. CCPI/CHC is granted leave to intervene in this appeal pursuant to Rule 109 of the *Federal Courts Rules;*

2. CCPI/CHC is entitled to receive all materials filed in this appeal;

3. CCPI/CHC may serve a memorandum of fact and law, in accordance with the prescriptions as to font and format set out in the *Federal Courts Rules;*

4. CCPI/CHC's memorandum of fact and law shall be limited to the application of positive obligations under section 7 of the *Charter of Rights and Freedoms* to the issues raised in this appeal;

5. CCPI/CHC shall accept the record in its current stage, and not seek to file any additional evidence;

6. CCPI/CHC shall be allowed to present oral argument at the hearing of the appeal, with the time for oral argument by counsel to CCPI/CHC to be determined by the panel hearing the appeal;

7. CCPI/CHC shall seek no costs in respect of the appeal, and shall have no costs ordered against it; and

8. The style of cause shall be changed to add CCPI/CHC as an intervener, and hereafter all documents shall be filed under the amended style of cause.

THE GROUNDS FOR THE MOTION ARE:

9. CCPI/CHC has a genuine interest in this case;

10. CCPI/CHC can make a unique, important, and useful contribution to this case;

11. CCPI/CHC's participation in this case is in the interests of justice; and

12. CCPI/CHC will not delay the application or duplicate materials.

13. If granted leave to intervene, CCPI/CHC will abide by any schedule set by this Court for the delivery of materials and for oral argument.

14. If granted leave to intervene, CCPI/CHC will seek no costs and would ask that no costs be awarded against it.

AND TAKE FURTHER NOTICE THAT in support of this motion, CCPI/CHC will rely upon:

15. The Affidavit of Vincent Calderhead, Secretary of the Charter Committee on Poverty Issues, sworn 6 March 2015;

16. The Affidavit of Melissa Newitt, Interim National Coordinator of the Canada Health Coalition, sworn 6 March 2015;

17. Such further and other material as counsel may advise and this Honourable Court may allow.

9 March 2015

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CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH

Respondents

AFFIDAVIT OF VINCENT CALDERHEAD

I, Vincent Calderhead, MAKE OATH AND SAY:

I am the Secretary of the Charter Committee on Poverty Issues and verily believe the following:

1. The Charter Committee on Poverty Issues ("CCPI") is a national committee founded in 1989, bringing together low-income representatives and experts in human rights and constitutional law for the purpose of assisting poor people in Canada to promote and secure their rights under international human rights law and the *Canadian Charter of Rights and Freedoms* (the *Charter*). CCPI has both initiated and intervened in cases at the trial, appellate and Supreme Court levels, to ensure that poverty issues and the rights of poor people are

fully considered. CCPI consults with poor people, as well as experts across Canada and internationally, in developing the positions it advances before courts.

2. CCPI has engaged in legal research and consultation with affected constituencies on subjects of concern to poor people that are of direct relevance to the present case, including:

- the extent to which sections 7 and 15 of the *Charter* require positive measures by governments to ensure access to adequate food, housing, health care and other necessities;
- section 7 and the right to health care under international human rights law;
- sections 7 and 15 of the *Charter* as guarantees of equal access to justice by poor people.

3. CCPI has been granted intervener status in 13 cases at the Supreme Court of Canada, including:

- *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791 in which CCPI argued jointly with the Canada Health Coalition ("CHC") that the right to health care under section 7 of the *Charter* should be interpreted in a manner that ensures access to health care for those who lack the means to access private health care;
- *R. v. Wu [2003]* 3 S.C.R. 530, in which CCPI argued that those unable to pay a fine because of poverty should not face harsher punishment than more affluent offenders;
- *Gosselin v. Québec (Attorney General)* [2002] 4 S.C.R. 429, in which CCPI argued that the section 7 should be interpreted as including positive obligations on

governments to ensure that disadvantaged members of society have access to basic necessities of life;

- *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R., in which CCPI argued that courts should interpret and apply Canadian laws consistently with international human rights treaties ratified by Canada;

- *New Brunswick (Minister of Health and Social Services) v. G.(J.)* [1999] 3 S.C.R. 46, in which CCPI argued that governments are required by section 7 of the *Charter* to take positive measures to ensure equal access to justice for poor people;

- *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624, in which CCPI argued that governments are required by section 15 of the *Charter* to take positive measures to ensure equal access to health care.

4. CCPI intervened before the Federal Court, and before this Court, in the case of *Toussaint v. Canada (Citizenship and Immigration)*, 2009 FC 873 (on appeal, 2011 FCA 146) to address, *inter alia*, the question of whether section 7 of the *Charter* imposes an obligation on the federal government to ensure equal access for those living in poverty to Humanitarian and Compassionate consideration under the *Immigration and Refugee Protection Act* SC 2001, c 27.

5. CCPI intervened before Lederer J. of the Ontario Superior Court and before the Court of Appeal for Ontario in the case of *Tanudjaja v. Attorney General (Canada) (Application)* 2013 ONSC 5410 (on appeal, 2014 ONCA 852) to address issues related to positive obligations under section 7 in that case.

6. CCPI's role in promoting the interpretation and application of the *Charter* in a manner that properly considers the perspective and rights of those living in poverty has been widely recognized both in Canada and internationally. For instance, the National Judicial Institute has made use of CCPI's expertise in this area on several occasions, to provide social context education on poverty issues to judges from six different provinces.

7. CCPI has a direct interest in ensuring that refugees and asylum seekers living in poverty have access to health care necessary for life and security. CCPI and the constituencies it represents also have a genuine interest in the issue of whether the *Charter* imposes positive obligations on governments to protect the right to life and security of the person of those who are unable to afford private health care, including the Respondent refugees and asylum seekers in this case. CCPI also has an interest in ensuring that the Court's approach to section 7 in this case does not deprive people living in poverty of the full benefit of *Charter's* protections. CCPI represents and is accountable to people living in poverty and others in Canada who require access to publicly funded health care. Their interest in the outcome of this case relates to the practical effects of both the decision on access to health care and the interpretation of the scope of section 7 of the *Charter*.

8. A core component of the mandate of CCPI is to ensure that the rights of people living in poverty are fully and properly considered by the courts. CCPI/CHC has challenged *Charter* interpretations and governments' efforts to restrict the role of the courts in ways that would deprive people living in poverty of the full benefit of the *Charter*, particularly rights to life, security of the person and the equal benefit of the law in the context of access to health care. This mandate is directly engaged by the decision of the Court below.

9. The approach taken by Justice Mactavish to the application of section 7 in this case was similar to, and it relied upon, the findings of Lederer J. of the Ontario Superior Court in *Tanudjaja v. Attorney General (Canada) (Application)* (*Tanudjaja* ONSC) 2013 ONSC 5410. In that case, Justice Lederer held that section 7 does not impose positive obligations on governments to ensure access to adequate housing, asserting that such a finding would require that section 7 confer a self-standing right to adequate housing (*Tanudjaja* ONSC, paras 81-81). Justice Mactavish adopted Justice Lederer's reasoning in the *Tanudjaja* case and she made a similar finding with respect to section 7 and access to health care in the present case. CCPI was granted intervener status before the Ontario Court of Appeal in the *Tanudjaja* case to assist that Court in considering the implications of Justice Lederer's holding for those living in poverty and has a similar interest in addressing these issues in the present case.

10. Justice Mactavish, in her decision, and the Attorney General for Canada, in its submissions, rely on a particular assessment of the implications of the Supreme Court of Canada's decision in *Chaoulli* with respect to section 7 and access to publicly funded health care. CCPI was granted intervener status before the Supreme Court of Canada with respect to that issue and has a genuine interest in addressing similar issues in the present case.

11. After careful review of the written materials filed by the Appellants and Respondents on this appeal, CCPI has decided to apply to intervene in this case jointly with CHC (together, "CCPI/CHC") to argue that government measures that deny access to health care and engage section 7 protected rights, including the rights of refugees, asylum seekers and others who rely on publicly funded health care, must be subject to judicial scrutiny to

determine if they accord with principles of fundamental justice and can be justified under section 1. Critically, CCPI/CHC waited to receive and review the Respondents' Memorandum of Fact and Law before bringing this motion, in order to avoid duplication of argument before this Court.

12. If granted leave to intervene in this appeal, CCPI/CHC will focus their submissions on the importance of ensuring the equal benefit of section 7 rights to life and to security of the person for disadvantaged groups, including refugees and asylum seekers, in the context of access to health care. CCPI/CHC will also argue that:

- The Attorney General of Canada and Mactavish J.'s characterization of the current state of the law in Canada with respect to positive obligations under section 7 is inaccurate and misconstrues the implications of the Supreme Court of Canada's decision in *Chaoulli*.

- Claims advanced by disadvantaged groups to section 7 protection of rights to life and security of the person in relation to government benefits and programs on which they rely for dignity, security and even survival, should not be equated with claims to "free standing" economic rights. Mischaracterizing their life, liberty and security of the person claims in this way serves to deprive poor people, including the Respondents who have been denied access to the IFHP in this case, of the equal benefit of the *Charter*'s protection.

- The section 7 rights of those who are disadvantaged or live in poverty frequently rely on positive measures by governments for protection. As the Supreme Court of Canada

noted in *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 SCR 927 at 993, "[v]ulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude."

- In *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, the Supreme Court considered the circumstances of those who could afford to purchase private health insurance, and the majority of the Court impugned governmental interference with that group's access to health care necessary for life and security of the person. The Court did not, in *Chaoulli*, make any determination as to the scope of section 7 protection for vulnerable individuals who lack the means to pay for private health care. That issue is squarely before the Court in the present case. In CCPI/CHC's proposed submission, it is critical to the integrity of the *Charter* that section 7 offer an equal level of protection to vulnerable groups, including the refugees and asylum seekers whose life and security of the person is threatened in this case.

- Where the Supreme Court of Canada has considered and applied section 7 so as to require positive measures by governments, it has adopted a more nuanced approach than has been advanced by some lower courts, including by Mactavish J. in the present case. For instance, in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46, in which CCPI intervened, the Supreme Court held at para. 107 that the omission of a freestanding right to state-funded counsel from the *Charter*: "does not preclude an interpretation of s. 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing." Similarly, in *Gosselin v. Québec (Attorney*

General), [2002] 4 S.C.R. 429, in which CCPI also intervened, when governments argued that section 7 does not include a positive right to an adequate level of social assistance, the Supreme Court explicitly left open the possibility, at para. 83 (per McLachlin C.J.) that inadequate social assistance rates can violate section 7 where there is evidence of "actual hardship" engaging section 7 protected interests.

- A more nuanced approach to the question of positive obligations under section 7 also accords with the Federal Court's and with this Court's previous consideration of the issue of section 7 and access to the IFHP. In *Toussaint v. Canada (Attorney General)*, 2010 FC 810, the Federal Court rejected the Attorney General of Canada's arguments that, because there is no freestanding right to health care in the *Charter*, a denial of access to the IFHP cannot engage section 7 rights. Zinn J. held that the Attorney General had "misconstrued" the implications of the *Chaoulli* decision and had failed to place the Chief Justice's statement regarding the absence of a "freestanding right to health care" in context.

- At paragraphs 73-75 and 90-91 of that decision, Justice Zinn found that, on the evidence, the denial of access to the IFHP in the *Toussaint* case violated section 7 rights to life and security of the person and therefore required a determination of whether the denial was in accordance with principles of fundamental justice. On appeal (2011 FCA 213), this Court at paras. 57-88 did not depart from Justice Zinn's finding that restrictions on access to publicly funded health care, creating a risk to life and adverse long term health consequences, must be subject to section 7 scrutiny in

the same way that restrictions on access to privately funded health care were subject to such scrutiny in *Chaoulli*.

- Rather than being immunized from section 7 review, government measures that deny vulnerable groups access to health care, including the denial of IFPH benefits to refugees and asylum seekers in this case, must be subject to the highest level of judicial scrutiny under section 7, both because of the vulnerability of those whose rights are at stake and because of the fundamental nature of the interests engaged.

13. If granted leave to intervene, CCPI/CHC would provide an important and unique perspective and approach to the issues raised in this appeal. CCPI/CHC has a combined experience and understanding of the ways in which particular approaches to *Charter* interpretation may be prejudicial to the interests and rights of those living in poverty. They have experience before the Supreme Court of Canada and before other courts in addressing the critical issues being considered in the present case.

14. Many of the cases cited by Mactavish J. in her discussion of section 7 of the *Charter* are those in which members of CCPI/CHC have intervened. It is in the interests of justice that this Court continue to address the evolving jurisprudence concerning the complex relationship between positive obligations and section 7 of the *Charter* with the perspective and expertise of CCPI/CHC.

15. If granted leave to intervene, CCPI/CHC will review the proposed arguments of any interveners so as not to duplicate argument and materials before the Court. CCPI/CHC fully understands the proper role of interveners in proceedings such as the present appeal, and will

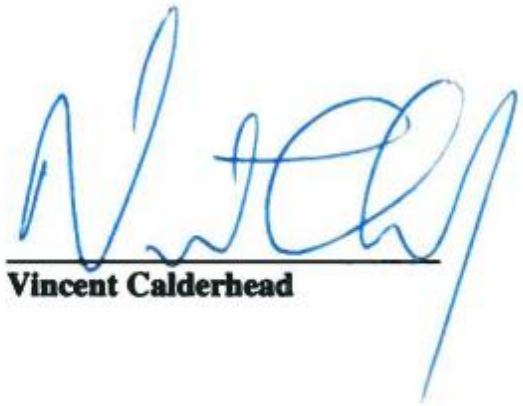
not make arguments with respect to the findings of fact or the characterization of the evidence in this case, nor will they seek to supplement the factual record.

16. If granted leave to intervene, CCPI/CHC will abide by any schedule set by this Court for the delivery of materials and for oral argument. CCPI/CHC will seek no costs and would ask that no costs be awarded against them.

17. The longstanding engagement of CCPI in research and advocacy addressing both the conceptual and practical dimensions of the application of section 7 in relation to access to health care will be of significant benefit to the Court and support the granting of intervener status to CCPI/CHC in this case.

SWORN TO before me on March 6, 2015, at Halifax, Nova Scotia

Signature of Authority
Print Name: KRISTA FORBES
Official Capacity: A Barrister of the Supreme Court of Nova Scotia



Vincent Calderhead

FEDERAL COURT OF APPEAL

AFFIDAVIT OF VINCE CALDERHEAD

sworn 6 March 2015

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Respondents

AFFIDAVIT OF MELISSA NEWITT

I, Melissa Newitt, MAKE OATH AND SAY:

1. I am the Interim National Coordinator of the Canadian Health Coalition and do verily believe the following:

2. The Canadian Health Coalition ("CHC") is dedicated to preserving and enhancing Canada's public health care system for the benefit of all residents of Canada, regardless of economic, social, citizenship or other status. Founded in 1979, the Coalition includes organizations representing seniors, women, faith groups, students, consumers, labour unions, recent immigrants and health care professionals from across Canada. CHC is dedicated to promoting informed discussion and assessment of public policy and legislation linked to access

to health care, based on reliable evidence and full consideration of the interests and needs of disadvantaged groups.

3. The CHC believes that access to health care is of such direct and fundamental importance to every resident of Canada that the administration and operation of Canada's health care and publicly funded health insurance system must be thoroughly transparent, accountable and subject to rigorous scrutiny for compliance not only with the requirements of the *Canada Health Act* but with rights guaranteed by the *Canadian Charter of Rights and Freedoms* and international human rights law.

4. CHC provides extensive information on access to publicly funded health care through its website, which is the repository for a substantial library of archival material and is widely recognized as one of the best sources of up-to-date and topical information about Canada's health care system. In particular, the CHC has provided information on Refugee Health Care and the impact of changes to eligibility for publicly funded health care under the Interim Federal Health Program ("IFHP").

5. CHC has organized national and regional conferences, hosted round-table discussions, circulated petitions, organized public services announcements, initiated and coordinated traditional and social media campaigns and responded to hundreds of public speaking requests on the subjects of health and access to health care. The CHC is frequently called upon to provide national and regional media with analysis and commentary concerning Canada's health care system. CHC has also made numerous presentations to parliamentary and legislative committees,

met with provincial and federal politicians as well as First Nations' leaders, organized teach-ins and lobby sessions on Parliament Hill, and otherwise engaged in public advocacy intended to promote the maintenance and enhancement of the public health care and health insurance system and ensure universal access to health care.

6. CHC assesses changes to law or policy for their effects on access to publicly funded health care and disseminates the results of its research to the public as well as to policy makers and governments. For example, CHC has conducted research into the impact of the Canada-European Union Free Trade Agreement on the public health care system in Canada and submitted its findings to the Parliamentary Committee on International Trade in 2014. In 2014 CHC helped to organize a "shadow summit" of non-governmental organizations and health care consumers at Niagara-on-the-Lake when provincial and territorial premiers attended the "Council of the Federation" meeting, to advocate for a renewed commitment to the public health care system after the expiry of the 10 year federal-provincial-territorial health care accord.

7. CHC has conducted extensive research and advocacy on the issue of access to medication by disadvantaged groups, and the need for a universal pharmacare plan. CHC has organized public hearings across Canada to hear experiences and insights regarding the cost, effectiveness, appropriateness, and availability of prescription drugs. CHC published a report jointly with the Canadian Centre for Policy Alternatives reporting on the results of these hearings and it continues to advocate for universal access to pharmaceuticals based on need, rather than ability to pay, consistent with the principles of the *Canada Health Act* and the Canadian medicare system.

8. CHC has been extremely concerned about changes to federal law and policy affecting access to health care as well as the life and security of refugee claimants. In 2014 CHC published an open letter with Health for All raising concerns about sections of the Budget Bill C-43 which allowed provinces to restrict access to social assistance for refugee claimants and others.

9. CHC has also engaged in litigation to promote the maintenance and enhancement of the public health care system and protect universal access to health care based on need rather than ability to pay. For example, in light of the Auditor General of Canada's criticisms of the Federal Minister of Health's performance in regard to the transparency and accountability requirements of the *Canada Health Act*, and in response to CHC members' own observations and concerns, the CHC sought and was granted standing, jointly with several other non-governmental organizations, to bring an action in the Federal Court - Trial Division for declaratory and other relief under the *Canada Health Act* (FC Court File No. T-709-03).

10. CHC was also granted intervener status jointly with the Charter Committee on Poverty Issues ("CCPI" and, jointly, "CCPI/CHC") before the Supreme Court of Canada in the case of *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791. In its intervention in that case, CCPI/CHC argued that the right to access health care is a component of the rights protected under section 7 of the *Charter*. In particular, CCPI/CHC submitted that section 7 should be interpreted and applied so as to guarantee access to health care based on need, and not ability to pay, and should ensure equal protection of the life and security of the person rights of those who lack the means to access private health care.

11. CHC is concerned that the approach to section 7 adopted by Justice Mactavish in her decision in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 is premised on the assumption that a denial of access to publicly funded health care necessary for life and security of the person is not subject to the same section 7 scrutiny as the denial of access to privately funded health care at issue in *Chaoulli*. At paragraph 571 of her decision, Mactavish J. wrote that applying section 7 to a denial of access to publicly funded health care would require "a section 7 *Charter* right to state-funded health care."

12. CHC believes that, although health care is not explicitly recognized as a right in the *Charter*, access to health care based on need rather than ability to pay is widely understood as a fundamental right in Canada, as reflected in the overarching principles of the *Canada Health Act* and in Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights* and other international human rights treaties guaranteeing the equal enjoyment of the right to health and to health care based on need. CHC believes that an approach to section 7 that denies the protection of the right to life and security of the person in relation to access to publicly funded health care is at odds with the core values that lie behind the publicly funded health care system, Canada's international human rights undertakings and the *Charter* – values which CHC is dedicated to promoting.

13. After careful review of the written materials filed by the Appellants and Respondents on this appeal, CHC has decided to apply to intervene in this case jointly with CCPI to argue that government measures that deny access to health care and engage section 7 protected rights, including the rights of refugees, asylum seekers and others who rely on publicly funded health

care, must be subject to judicial scrutiny to determine if they accord with section 7 principles of fundamental justice and can be justified under section 1 of the *Charter*. Critically, CCPI/CHC waited to receive and carefully review the Respondents' Memorandum of Fact and Law before bringing this motion, in order to avoid duplication of argument before this Court.

14. If granted leave to intervene in this appeal, CCPI/CHC will focus their submissions on the importance of ensuring the equal benefit of section 7 rights to life and to security of the person for disadvantaged groups, including refugees and asylum seekers, in the context of access to health care. CCPI/CHC will also argue that:

- The Attorney General of Canada and Mactavish J.'s characterization of the current state of the law in Canada with respect to positive obligations under section 7, particularly in relation to access to health care, is inaccurate and misconstrues the implications of the Supreme Court of Canada's decision in *Chaoulli*.

- Access to health care and other claims advanced by disadvantaged groups to section 7 protection of rights to life and security of the person in relation to government benefits and programs on which they rely for dignity, security and even survival, should not be equated with claims to "free standing" economic rights. Mischaracterizing their life, liberty and security of the person claims in this way serves to deprive poor people, including the Respondents who have been denied access to the IFHP in this case, of the equal benefit of the *Charter*'s protection.

- The section 7 rights of those who are disadvantaged or live in poverty frequently rely on positive measures by governments for protection. As the Supreme Court of Canada noted in *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 SCR 927 at 993, "[v]ulnerable

groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude."

- In *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, the Supreme Court considered the circumstances of those who could afford to purchase private health insurance, and the majority of the Court impugned governmental interference with that group's access to health care necessary for life and security of the person. The Court did not, in *Chaoulli*, make any determination as to the scope of section 7 protection for vulnerable individuals who lack the means to pay for private health care. That issue is squarely before the Court in the present case. In CCPI/CHC's proposed submission, it is critical to the integrity of the *Charter* and the principles of constitutionalism and the rule of law that section 7 offer an equal level of protection to vulnerable groups, including the refugees and asylum seekers whose life and security of the person is threatened in this case.

- Where the Supreme Court of Canada has considered and applied section 7 so as to require positive measures by governments, it has adopted a more nuanced approach than has been advanced by some lower courts, including by Mactavish J. in the present case. For instance, in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46, in which CCPI intervened, the Supreme Court held at para. 107 that the omission of a freestanding right to state-funded counsel from the *Charter*: "does not preclude an interpretation of s. 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing." Similarly, in *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, in which CCPI also intervened, when governments argued that section 7 does not include a

positive right to an adequate level of social assistance, the Supreme Court explicitly left open the possibility, at para. 83 (per McLachlin C.J.), that inadequate social assistance rates can violate section 7 where there is evidence of "actual hardship" engaging section 7 protected interests.

- A more nuanced approach to the question of positive obligations under section 7 also accords with the Federal Court's and with this Court's previous consideration of the issue of section 7 and access to the IFHP. In *Toussaint v. Canada (Attorney General)*, 2010 FC 810, the Federal Court rejected the Attorney General of Canada's arguments that, because there is no freestanding right to health care in the *Charter*, a denial of access to the IFHP cannot engage section 7 rights. Zinn J. held that the Attorney General had "misconstrued" the implications of the *Chaoulli* decision and had failed to place the Chief Justice's statement regarding the absence of a "freestanding right to health care" in context.

- At paragraphs 73-75 and 90-91 of that decision, Justice Zinn found that, on the evidence, the denial of access to the IFHP in the *Toussaint* case violated section 7 rights to life and security of the person and therefore required a determination of whether the denial was in accordance with principles of fundamental justice. On appeal (2011 FCA 213) this Court, at paras. 57-88, did not depart from Justice Zinn's finding that restrictions on access to publicly funded health care, creating a risk to life and adverse long term health consequences, must be subject to section 7 scrutiny in the same way that restrictions on access to privately funded health care were subject to such scrutiny in *Chaoulli*.

- Rather than being immunized from section 7 review, government measures that deny vulnerable groups access to health care, including the denial of IFPH benefits to refugees

and asylum seekers in this case, must be subject to the highest level of judicial scrutiny under section 7, both because of the vulnerability of those whose rights are at stake and because of the fundamental nature of the interests engaged.

15. If granted leave to intervene, CCPI/CHC will review the proposed arguments of any interveners so as not to duplicate argument and materials before the Court. CCPI/CHC fully understands the proper role of interveners in proceedings such as this appeal, and will not make arguments with respect to the findings of fact or the characterization of the evidence in this case, nor will they seek to supplement the factual record.

16. If granted leave to intervene, CCPI/CHC will abide by any schedule set by this Court for the delivery of materials and for oral argument. CCPI/CHC will seek no costs and would ask that no costs be awarded against them.

17. CHC's interests in the issues raised in this appeal are directly related to its core mandate – to ensure access to publicly funded health care based on need rather than ability to pay and to ensure that the *Charter* is interpreted and applied in a manner that affords full recognition to, and equal protection of, the right of access to publicly funded health care consistent with the underlying principles of Canada's health care system.

18. The longstanding engagement of CHC in research and advocacy in relation to the publicly funded health care system and access to health care in Canada will be of significant benefit to the Court and support the granting of intervener status to CCPI/CHC in this case.

SWORN BEFORE ME at the City of Ottawa
in the Province of Ontario this)
6th day of March, 2015)
)
)
)
A Commissioner for Taking Affidavits)
LOUISE BÉLANGER-HARDY
243211 M

Melissa Newitt

FEDERAL COURT OF APPEAL

AFFIDAVIT OF MELISSA NEWITT

sworn 6 March 2015

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Court File No. A-407-14

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

-and-

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH

Respondents

WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENERS the Charter Committee on Poverty Issues (CCPI) and the Canadian Health Coalition (CHC)

Motion for Leave to Intervene

OVERVIEW

1. The Charter Committee on Poverty Issues ("CCPI") and the Canadian Health Coalition ("CHC") seek leave to intervene jointly in this appeal; to submit a joint memorandum; and to make oral argument on behalf of both organizations. CCPI and CHC (jointly, "CCPI/CHC") together have a long history of research, advocacy and a proven expertise in relation to the *Canadian Charter of Rights and Freedoms* ("*Charter*") and access to health care by disadvantaged groups. In particular, CCPI/CHC was granted intervener status before the Supreme Court of Canada in *Chaoulli v. Quebec (Attorney General)*[1] to address the application

[1] *Infra* note 6.

of section 7 to health care access. CCPI/CHC seeks to provide similar assistance to this Court as it considers the pivotal issue of the impact of section 7 in this case.

2. The approach to section 7 adopted by Justice Mactavish in the Court below, and advanced by the Attorney General of Canada in this appeal, is premised on the assumption that there is a fundamental difference between applying section 7 to the denial of access to privately funded health care, at issue in *Chaoulli*, and applying it to the denial of access to publicly funded health care, at issue in the present case. Mactavish J. held that applying section 7 to a denial of access to publicly funded health care would require "a section 7 *Charter* right to state-funded health care." [2] Relying on the Chief Justice's statement in *Chaoulli* that "the *Charter* does not confer a freestanding right to health care," Justice Mactavish concluded that, as the law now stands, a positive right to state funded health care does not exists in Canada and the Respondents' section 7 claim must therefore fail.

3. If given leave to intervene, CCPI/CHC will argue that Justice Mactavish misunderstood the implications of the Supreme Court of Canada's decision in the *Chaoulli* case and the current state of the law with respect to section 7. CCPI/CHC will argue that the proposed distinction between the protection section 7 extends to those who can afford private health care and the protection it offers to those who rely on access to publicly funded health care would, if accepted, deprive people living in poverty of the equal protection and benefit of the fundamental constitutional right to life and security of the person.

4. CCPI/CHC will argue that Justice Mactavish failed to follow the more nuanced approach to the question of positive obligations under section 7 that accords with the Federal Court's and

[2] Appeal Book, Vol I, Tab 2: Judgement and Reasons ("Judgement"), at para 571. See also paras 8, 1077.

with this Court's previous consideration of the issue of section 7 and access to the Interim Federal Health Program ("IFHP") in *Toussaint v. Canada (Citizenship and Immigration)*[3]. CCPI intervened both at the Federal Court and this Court in *Toussaint* to address, *inter alia*, arguments of the Attorney General of Canada that were similar to the holding of Mactavish J. in this case.

5. CCPI/CHC will argue that a section 7 claim to life and security of the person in relation to publicly funded health care, such as the Respondents' claim in this case, cannot be reduced to a claim that the *Charter* confers a freestanding right to health care. CCPI/CHC will argue that government measures that deny access to health care and engage section 7 protected rights, including the rights of refugees, asylum seekers and others who rely on publicly funded health care, must be subject to judicial scrutiny to determine if they accord with principles of fundamental justice and can be justified under section 1.

6. CCPI/CHC is committed to not repeating arguments already advanced by the Respondents/Cross-Appellants in this case. CCPI/CHC waited to review the submissions of the Respondents/Cross-Appellants before making a decision to seek leave to intervene before this Court. CCPI/CHC seeks leave to intervene in order to provide a different and valuable perspective with respect to section 7 in the specific context of this appeal.

7. CCPI/CHC's interests in the issues raised in this appeal are directly related to the core mandates of the two organizations – to ensure access to state funded health care based on need rather than ability to pay and to ensure that the *Charter* is interpreted and applied in a manner that affords full recognition to, and equal protection of, the rights of those who are socio-economically disadvantaged.

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[3] *Infra* note 13.

8. The longstanding engagement of CCPI/CHC in research and advocacy addressing both the conceptual and practical dimensions of the application of section 7 in relation to access to health care will be of significant benefit to the Court and support the granting of intervener status to CCPI/CHC in this case.

PART I – FACTS

A. CCPI's Interest and Expertise

9. CCPI is a national committee founded in 1989, bringing together low-income representatives and experts in human rights, constitutional law and poverty law for the purpose of assisting poor people in Canada to secure and assert their rights under international human rights law and the *Charter*. CCPI has initiated and intervened in a number of cases at the trial, appellate and Supreme Court levels, to ensure that poverty issues and the rights of poor people are fully considered. CCPI consults with poor people, as well as experts across Canada and internationally, in developing the positions it advances before courts.[4]

10. CCPI has engaged in legal research and consultation with affected constituencies on subjects of concern to poor people that are of direct relevance to the present case, including:

- the extent to which sections 7 and 15 of the *Charter* require positive measures by governments to ensure access to adequate food, housing, health care and other necessities;

- section 7 and the right to health care under international human rights law;

[4] CCPI/CHC Motion Record ("CCPI/CHC MR"), Tab 2: Affidavit of Vince Calderhead ("Calderhead Affidavit") at para. 1.

- sections 7 and 15 of the *Charter* as guarantees of equal access to justice by poor people.[5]

11. CCPI has been granted intervener status in 13 cases at the Supreme Court of Canada and in other cases before lower court and tribunals raising issues of concern to people living in poverty, including:

- *Chaoulli v. Quebec (Attorney General)*[6], in which CCPI argued jointly with CHC that the right to health care under section 7 of the *Charter* should be interpreted in a manner that ensures access to health care for those who lack the means to access private health care;

- *R. v. Wu*[7], in which CCPI argued that those unable to pay a fine because of poverty should not face harsher punishment than more affluent offenders;

- *Gosselin v. Québec (Attorney General)*[8], in which CCPI argued that the section 7 should be interpreted as including positive obligations on governments to ensure that disadvantaged members of society have access to basic necessities of life;

- *Baker v. Canada (Minister of Citizenship and Immigration)*[9], in which CCPI argued that courts should interpret and apply Canadian laws consistently with international human rights treaties ratified by Canada;

- *New Brunswick (Minister of Health and Social Services) v. G.(J.)*[10], in which CCPI argued that governments are required by section 7 of the *Charter* to take positive measures to ensure equal access to justice for poor people;

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[5] *Ibid* at para. 2
[6] [2005] 1 S.C.R. 791, 2005 SCC 35. Note: citation information provided here as a formality; the cases in this Part are neither included in the Book of Authorities, nor relied up on as authorities in support of this motion.
[7] [2003] 3 S.C.R. 530.
[8] [2002] 4 S.C.R. 429.
[9] [1999] 2 S.C.R. 817.

- *Eldridge v. British Columbia (Attorney General)*[11], in which CCPI argued that governments are required by section 15 of the *Charter* to take positive measures to ensure that disadvantaged groups have equal access to health care.[12]

12. CCPI intervened before the Federal Court, and before this Court, in the case of *Toussaint v. Canada (Citizenship and Immigration)*[13] to address, *inter alia*, the question of whether section 7 imposes an obligation on the federal government to provide equal access for those living in poverty to Humanitarian and Compassionate consideration under the *Immigration and Refugee Protection Act*.[1415]

13. CCPI intervened before Lederer J. of the Ontario Superior Court and before the Court of Appeal for Ontario in the case of *Tanudjaja v. Attorney General (Canada)*[16] to address issues related to positive obligations under section 7 in that case.[17]

14. CCPI's role in promoting the interpretation and application of the *Charter* in a manner that properly considers the perspective and rights of those living in poverty has been widely recognized both in Canada and internationally. For instance, the National Judicial Institute has made use of CCPI's expertise in this area on several occasions, to provide social context education on poverty issues to judges from six different provinces.[18]

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[10] [1999] 3 S.C.R. 46.
[11] [1997] 3 S.C.R. 624.
[12] CCPI/CHC MR, Tab 2: Calderhead Affidavit at para. 3.
[13] 2009 FC 873 at first instance; 2011 FCA 146 on appeal.
[14] SC 2001, c 27.
[15] CCPI/CHC MR, Tab 2: Calderhead Affidavit at para. 4.
[16] *(Application)* 2013 ONSC 5410 at first instance; 2014 ONCA 852 on appeal.
[17] CCPI/CHC MR, Tab 2: Calderhead Affidavit at para. 5.
[18] *Ibid* at para. 6.

15. CCPI has a mandate to advance the constitutional rights of poor people in Canada, and to ensure that those rights are fully and properly considered by courts. CCPI represents and is accountable to people living in poverty, including refugees and asylum seekers, who require access to publicly funded health care.[19]

B. CHC's Interest and Expertise

16. CHC is a national coalition, founded in 1979, bringing together a wide range of local, provincial and national organizations dedicated to preserving and enhancing Canada's public health care system for the benefit of all residents of Canada, regardless of economic, social, citizenship or other status. CHC works to foster informed discussion and assessment of public policy and legislation linked to access to health care and to promote the underlying values of the publicly funded health care system, including the fundamental principle that access to health care in Canada must be based on need, rather than ability to pay.[20]

17. CHC assesses changes to law or policy for their effects on access to publicly funded health care and disseminates the results of its research to the public as well as to governments. CHC has been extremely concerned about changes to federal laws and policies negatively affecting the health and wellbeing of refugee claimants in Canada. In 2014 CHC published an open letter with Health for All raising concerns about sections of the Budget Bill C-43 which allowed provinces to restrict access to social assistance for refugee claimants and others.[21]

18. The CHC's website, widely recognized as one of the best sources of up-to-date and topical information about Canada's health care system, is a key mechanism for providing

[19] *Ibid* at paras. 7-8.
[20] CCPI/CHC MR, Tab 3: Affidavit of Melissa Newitt ("Newitt Affidavit") at para. 2.
[21] *Ibid* at paras. 6-8.

information to the public about issues of current health care concern. Through its website, CHC has sought to disseminate information to its membership and to alert the wider Canadian public about the issue of refugee health care, the impact of changes made by the federal government to eligibility for publicly funded health care under the IFHP, and the *Charter* challenge that is before this Court in the present case.[22]

19. CHC has engaged in litigation to promote the maintenance and enhancement of the public health care system and to protect universal access to health care. Of direct relevance to the present case, CHC was granted intervener status jointly with CCPI before the Supreme Court of Canada in *Chaoulli*. In its intervention in that case, CCPI/CHC argued that the right to access health care is a component of the rights protected under section 7 of the *Charter* and that section 7 should be interpreted in a manner that ensures access to health care based on need and that guarantees equal protection to the life and security of the person of those who lack the means to access private health care.[23]

20. CHC believes that an approach to section 7 that denies the protection of the right to life and security of the person in relation to access to publicly funded health care is at odds with the core values of the publicly funded health care system – values which CHC has worked tirelessly for over three decades to promote and defend.[24]

C. CCPI/CHC's Proposed Intervention

21. CCPI/CHC waited to receive and review the Memoranda of Fact and Law of both the Appellants and the Respondents to this appeal before bringing this motion. CCPI/CHC did so to

[22] *Ibid* at para. 4.
[23] *Ibid* at paras. 9-10.
[24] *Ibid* at para. 12.

avoid duplication of argument before this Court. If granted leave to intervene, CCPI/CHC would similarly review the proposed arguments of any other interveners.[25]

22. If granted leave to intervene in this appeal, CCPI/CHC will focus their submissions on the importance of ensuring the equal benefit of section 7 rights to life and to security of the person for disadvantaged groups, including refugees and asylum seekers, in the context of access to health care. CCPI/CHC will argue that:

i. The Attorney General of Canada and Mactavish J.'s characterization of the current state of the law in Canada with respect to positive obligations under section 7, particularly in relation to access to health care, is inaccurate and misconstrues the implications of the Supreme Court of Canada's decision in *Chaoulli*.

ii. Access to health care and other claims advanced by disadvantaged groups to section 7 protection in relation to government benefits and programs on which they rely for dignity, security and even survival, should not be equated with claims to "free standing" economic rights. Mischaracterizing their life, liberty and security of the person claims in this way serves to deprive poor people, including the Respondents who have been denied access to the IFHP in this case, of the equal benefit of the *Charter*'s protection.

iii. The section 7 rights of those who are disadvantaged or live in poverty frequently rely on positive measures by governments. As the Supreme Court noted in in *Irwin Toy v. Quebec (Attorney General)*, "[v]ulnerable groups will claim the need for protection by

[25] CCPI/CHC MR, Tab 2: Calderhead Affidavit at paras.11 and 15; CCPI/CHC MR, Tab 3: Newitt Affidavit at paras. 13 and 15.

the government whereas other groups and individuals will assert that the government should not intrude."[26]

iv. In *Chaoulli*, the Supreme Court considered only the circumstances of those who could afford to purchase private health insurance, and the majority of the Court impugned governmental interference with that group's access to health care necessary for life and security of the person. The Court did not, in *Chaoulli*, make any determination as to the scope of section 7 protection for vulnerable individuals who lack the means to pay for private health care. That issue is squarely before the Court in the present case. In CCPI/CHC's proposed submission, it is critical to the integrity of the *Charter* and the principles of constitutionalism and the rule of law that section 7 offer an equal level of protection to vulnerable groups, including the refugees and asylum seekers whose life and security of the person are threatened in this case.

v. Where the Supreme Court of Canada has considered and applied section 7 so as to require positive measures by governments, it has adopted a more nuanced approach than has been advanced by some lower courts, including by Mactavish J. in the present case. For instance, in *G.(J.)*, in which CCPI intervened, the Supreme Court held at that the omission of a freestanding right to state-funded counsel from the *Charter*: "does not preclude an interpretation of s. 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing."[27] Similarly, in *Gosselin*, in which CCPI also intervened, when governments argued that section 7 does not include a positive right to an adequate level of social

[26] [1989] 1 SCR 927 at 993.
[27] *Supra* note 10 at para 107.

assistance, the Supreme Court explicitly left open the possibility that inadequate social assistance rates can violate section 7 where there is evidence of "actual hardship" engaging section 7 protected interests.[28]

vi. A more nuanced approach to the question of positive obligations under section 7 also accords with the Federal Court's and with this Court's previous consideration of the issue of section 7 and access to the IFHP. In *Toussaint*, the Federal Court rejected the Attorney General of Canada's arguments that, because there is no freestanding right to health care in the *Charter*, a denial of access to the IFHP cannot engage section 7 rights. Zinn J. held that the Attorney General had "misconstrued" the implications of the *Chaoulli* decision and had failed to place the Chief Justice's statement regarding the absence of a "freestanding right to health care" in context.[29]

vii. Justice Zinn was correct to examine, based on the evidence presented in that case, whether the denial of access to the IFHP put the applicant's life or long-term health at risk and to find, on the evidence, that section 7 rights to life and security of the person had been violated. Having made such a determination, Zinn J. proceeded to consider whether the denial of IFHP was in accordance with principles of fundamental justice.[30] On appeal this Court did not depart from Justice Zinn's finding that restrictions on access to publicly funded health care must be subject to section 7 scrutiny, in the same way that

[28] *Supra* note 8 at para 83 (per McLachlin C.J.).
[29] *Supra* note 13 at first instance, paras. 73-75.
[30] *Ibid* at paras. 90-91.

restrictions on access to privately funded health care were subject to such scrutiny in *Chaoulli*.[31]

viii. Rather than being immunized from section 7 review, government measures that deny vulnerable groups access to health care, including the denial of IFHP benefits to refugees and asylum seekers in this case, must be subject to the highest level of judicial scrutiny under section 7, both because of the vulnerability of those whose rights are at stake and because of the fundamental nature of the interests engaged.[32]

23. CCPI/CHC fully understands the proper role of interveners in proceedings such as the present appeal, and will not make arguments with respect to the findings of fact or the characterization of the evidence in this case, nor will they seek to supplement the factual record. If granted leave to intervene, CCPI/CHC will abide by any schedule set by this Court for the delivery of materials and for oral argument, will seek no costs, and would ask that no costs be awarded against them.[33]

PART II – ISSUES

24. The issues raised on this motion are whether CCPI/CHC should be granted leave to intervene in this appeal and, if leave is granted, the terms governing CCPI/CHC's intervention.

[31] *Ibid* on appeal, at paras. 57 -88.
[32] CCPI/CHC MR, Tab 2: Calderhead Affidavit at para. 12; CCPI/CHC MR, Tab 3: Newitt Affidavit at para. 14.
[33] CCPI/CHC MR, Tab 2: Calderhead Affidavit at paras. 15-16; CCPI/CHC MR, Tab 3: Newitt Affidavit at paras. 15-16.

PART III – SUBMISSIONS

25. CCPI/CHC submits that this and other courts have a constitutional mandate to interpret and apply the *Charter* in a manner that secures to every individual in Canada the full benefit of the *Charter*'s protection. An over-riding consideration in the present case must be to ensure that those who, like the Respondents and other refugees and asylum seekers, live in poverty and are therefore unable to afford to pay for private health care, are not deprived of the benefit of one of the *Charter*'s most basic guarantees.

A. The test for determining whether leave to intervene should be granted

26. Rule 109 of the *Federal Court Rules*[34] provides that a proposed intervener must (a) describe how it wishes to participate in the proceeding, and; (b) how that participation will assist the determination of a factual or legal issue related to the proceeding. Rule 109 also provides that the Court shall give direction on the service of documents and the role of the intervener, should leave be granted.

27. In *Canada (Attorney General) v. Pictou Landing First Nations*[35] Stratas J.A. set out a test that captures the current approach of this Court with respect to intervention applications. This five-part test calls upon the court to determine whether the proposed intervener:

- has complied with the specific procedural requirements of Rule 109(2),
- has a genuine interest in the matter before the Court,
- will advance different and valuable insights that will assist the Court,
- ought to be granted leave, in the interests of justice, and

[34] SOR/98-106.
[35] CCPI/CHC Book of Authorities ("CCPI/CHC BoA"), Tab 6: 2014 FCA 21, 237 ACWS (3d) 570.

- will make a contribution consistent with the just, most expeditious, and least expensive determination of the proceeding.[36]

CCPI/CHC submits that they meet the test from *Pictou*.

B. CCPI/CHC meets the test

i. CCPI/CHC has met the specific requirements of Rule 109(2)

28. A proposed intervener must offer detailed and well-particularized evidence under Rule 109(2) that demonstrates how its proposed participation will assist the Court. To satisfy this requirement, the unique perspective and proposed contribution of the moving party must be related to an issue in the proceeding currently before the Court.[37]

29. CCPI/CHC's motion discharges the burden imposed by Rule 109(2). The motion sets out CCPI/CHC's wish to participate in the proceeding by way of filing a joint memorandum and presenting joint oral argument. The motion further explains how CCPI/CHC's participation will assist the Court's determination of the application of section 7 of the *Charter* to the restriction of access to the IFHP – a critical issue raised in the present appeal.[38]

30. By providing an outline of proposed submissions, this motion offers a *demonstration*, rather than a mere *assertion*, of how the moving party is prepared to assist the Court. This does not leave the Court to "speculate as to what role [the moving party] would play and whether that

[36] CCPI/CHC Book of Authorities ("CCPI/CHC BoA"), Tab 6: *Ibid* at para. 11.
[37] CCPI/CHC BoA, Tab 1: *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34 ("Dismissal of LEAF Motion") at paras. 18-19.
[38] The Respondents (on appeal) have cross-appealed from Mactavish J.'s dismissal of their section 7 claim in the decision below: see Respondents' Memorandum of Fact and Law, beginning at para. 79.

role would be of any assistance at all," as was the case in *Forest Ethics Advocacy Association v. Canada (National Energy Board)*[39].

ii. CCPI/CHC has a genuine interest in this case

31. As *Pictou* makes clear, the purpose of requiring that a proposed intervener have a genuine interest in the matter before the Court is so that "the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court."[40] This requirement will not be satisfied by a moving party with a merely "jurisprudential" interest in the proceeding.[41] However, where a proposed intervener has been previously engaged in litigation referred to by a decision under appeal, this Court has indicated that the proposed intervener's interest in the appeal may be more than jurisprudential.[42]

32. As outlined above, both CCPI and CHC have a direct interest in ensuring that refugees, asylum seekers, and people living in poverty have access to health care necessary for life and security. CCPI represents and is accountable to people living in poverty and has a mandate to defend and advance the constitutional rights of poor people in Canada. CHC has a mandate to promote universal access to Canada's public health care system. The interest of both CCPI and CHC in the outcome of this case is practical, as well as being directed to the broader principles of *Charter* interpretation that are directly applicable to this case.

33. The approach taken by Justice Mactavish to the application of section 7 in this case was similar to, and it relied upon, the findings of Lederer J. of the Ontario Superior Court in

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[39] CCPI/CHC BoA, Tab 3: 2013 FCA 236 at paras. 34-39, which was the example given in CCPI/CHC BoA, Tab 6: *Pictou*, *supra* note 35 at para. 14.
[40] CCPI/CHC BoA, Tab 6: *Pictou*, *supra* note 35 at paras. 11 and 15.
[41] CCPI/CHC BoA, Tab 1: Dismissal of LEAF motion, *supra* note 37 at para. 30.
[42] CCPI/CHC BoA, Tab 2: *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [2010] 1 FCR 226, 2000 CanLII 28285 (FCA) at para. 11.

Tanudjaja. In that case, Justice Lederer held that section 7 does not impose positive obligations on governments to guarantee access to adequate housing, asserting that such a finding would require that section 7 confer a self-standing right to adequate housing.[43] Justice Mactavish adopted Justice Lederer's reasoning in the *Tanudjaja* case and she made a similar finding with respect to section 7 and access to health care in the present case.[44] CCPI was granted intervener status before the Ontario Court of Appeal in the *Tanudjaja* case to assist that Court in considering the implications of Justice Lederer's holding for those living in poverty.[45]

34. CCPI/CHC was also granted intervener standing by the Supreme Court of Canada in *Chaoulli* to address very similar issues raised in that case in relation to the application of section 7 to access to health care. Justice Mactavish in her decision, and the Attorney General for Canada in its submissions before her, relied on a particular assessment of the implications of the Supreme Court's decision in *Chaoulli* with respect to section 7 and access to publicly funded health care.[46] CCPI/CHC has a clear and direct interest in addressing this issue as it applies in the present case.

35. CCPI/CHC's "genuine interest" in this case is underscored by the fact that either CCPI or CCPI/CHC intervened in six of the authorities referred to by Mactavish J. in her consideration of whether governments' positive obligations to provide health care are engaged by section 7 of the *Charter*.[47] This experience not only distinguishes CCPI/CHC's genuine interest in this appeal

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[43] Appeal Book, Vol I, Tab 2: Judgement at paras. 524-528.
[44] Appeal Book, Vol I, Tab 2: *Ibid* at para. 571.
[45] CCPI/CHC BoA, Tab 7: *Tanudjaja v. Canada (Attorney General)* (March 31 2014, unreported), Toronto M43540, M43549, M43525, M43545, M43551, M43534, M43547 (C57714) (ONCA) ("*Tanudjaja* intervention order") at paras. 9-10.
[46] Appeal Book, Vol I, Tab 2: Judgement at paras. 528, 531-535, 537-539.
[47] Aside from *Tanudjaja* and *Chaoulli*, Mactavish J. also cites *Gosselin*, *Toussaint, G.(J.)*, and *Eldridge*: see Appeal Book, Vol I, Tab 2: Judgement at paras. 514-516, 522, 549, 554, 556, and 562.

from the "jurisprudential" interest of the proposed intervener in *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*[48] – it also demonstrates how, in the words of Feldman J.A. of the Ontario Court of Appeal, "the proposed organizations and their constituencies have a significant interest in what the court may say in the course of that discussion, as well as in the outcome of the appeal."[49]

iii. CCPI/CHC will make a valuable and distinct contribution to this appeal

36. The third and central requirement for leave to intervene is that the proposed intervener will "advance different and valuable insights and perspectives that will actually further the Court's determination of the matter". This Court has further held that, even where a proposed intervener addresses issues already touched upon by the primary parties, the Court may nevertheless be assisted by further exploration of those issues through that intervention.[50]

37. If granted leave to intervene, CCPI/CHC would provide an important and unique perspective and approach to the issues raised in this appeal. None of the other parties has addressed the implications of the decision of the Court below for those living in poverty or the need to interpret and apply section 7 to ensure the equal benefit of the *Charter* for disadvantaged and vulnerable groups. In particular, the Respondents in their submissions as Cross-Appellants focus their section 7 analysis on the withdrawal of a previously available service to groups under the administrative control of the state. They do not explore the implications of the distinction between the application of section 7 to publicly funded versus privately funded health care, or

[48] CCPI/CHC BoA, Tab 2: *supra* note 42 at para. 11.
[49] CCPI/CHC BoA, Tab 7: *Tanudjaja* intervention order, *supra* note 45, at para. 9.
[50] CCPI/CHC BoA, Tab 6: *Pictou*, *supra* note 35 at paras. 11, 16, 23 and 27.

the broader implications of such a distinction for people living in poverty.[51] Thus, CCPI/CHC proposes to offer this Court a different perspective than the immediate parties to the appeal, without attempting to raise issues beyond those engaged by the appeal before the Court.[52]

38. CCPI/CHC has a combined experience and understanding of the ways in which particular approaches to *Charter* interpretation may be prejudicial to the interests and rights of those living in poverty. They have experience before the Supreme Court and before this and other courts in addressing the critical issues being considered in the present case. In its Order permitting CCPI to intervene in the *Toussaint* appeal to address the relationship between section 7 of the *Charter*, positive obligations, and the IFHP, this Court observed that "[i]nterveners such as… CCPI are precisely the type of parties who are able to assist the Court in dealing with the myriad of social policy and Charter issues which are raised."[53] CCPI/CHC respectfully submits that the same may be said of its proposed intervention in the appeal currently before this Court.

iv. Permitting the CCPI/CHC intervention is in the interests of justice

39. The fourth consideration that must be applied by the Court is whether the matter in which leave to intervene is sought "has assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those" of the immediate parties, such that the intervention should be permitted in the interests of justice.[54] As the Supreme Court held in *Hryniak v. Mauldin*, when courts must exercise discretion over procedural questions in "the interest of justice", the "inquiry… is, by its nature, comparative."[55] In the context of this motion,

[51] Respondents' Memorandum of Fact and Law at paras. 79-92.
[52] CCPI/CHC BoA, Tab 1: Dismissal of LEAF motion, *supra* note 37 at paras. 21 and 25.
[53] CCPI/CHC BoA, Tab 5: *Toussaint v. Canada (Minister of Citizenship and Immigration)* (March 18 2009, unreported), Toronto IMM-2926-08, IMM-3045-08, IMM-326-09 (FC) at p. 5.
[54] CCPI/CHC BoA, Tab 6: *Pictou*, *supra* note 35 at paras. 11 and 28.
[55] CCPI/CHC BoA, Tab 4: 2014 SCC 7, [2014] S.C.R. 87 at para. 58.

the question is whether the appeal would be disposed of more justly with, or without, the added perspective and argument that CCPI/CHC proposes to bring.

40. This Court has already acknowledged the public importance of the *Charter* issues raised in this appeal.[56] It is in the interests of justice that this Court continue to address the evolving jurisprudence concerning the complex relationship between positive obligations and section 7 of the *Charter* with the benefit of the perspective and expertise that CCPI/CHC brings.

41. In *Hryniak*, the Supreme Court considered the factors relevant to a trial judge's discretion to exercise enhanced fact-finding powers during a motion for summary judgement, *inter alia*, "in the interest of justice" – factors that may be analogized to other questions of procedural discretion, including motions for leave to intervene.[57] The Court in *Hryniak* made clear that *access to justice* is chief among the goals of the proportional exercise of procedural discretion.[58]

42. The proposed intervention by CCPI/CHC particularly serves the goal of access to justice by advancing the relevant perspectives of vulnerable groups of Canadians who will be directly affected by the outcome of this Court's consideration of the relationship between section 7 of the *Charter* and health care necessary to life and security of the person.

v. CCPI/CHC will assist in a just and expeditious determination of the appeal

43. Broadening the "interests of justice" inquiry above, this Court added a final consideration for intervention applications in *Pictou*: whether the proposed intervention is "inconsistent with the imperatives of Rule 3, namely securing 'the just, most expeditious and least expensive

[56] CCPI/CHC BoA, Tab 1: Dismissal of LEAF motion, *supra* note 37 at para.17.
[57] In its statement of the test for interventions, this Court cites *Hryniak* as a general authority for the addition of justice, expense, and delay-focused considerations: see CCPI/CHC BoA, Tab 6: *Pictou*, *supra* note 35 at para. 10.
[58] CCPI/CHC BoA, Tab 4: *Hryniak*, *supra* note 55 at paras. 1-2, 23-33, 52-53, 58-60.

determination of every proceeding on its merits'" by avoiding undue delay or complication of the proceedings. This Court further held that, even where a motion for leave to intervene is brought "well after the filing of the notice of appeal" and some delay is caused by the intervention, the imperatives of Rule 3 may be met through the imposition of "strict terms on the moving parties' intervention" – particularly where the issues addressed by the interveners were closely related to those already raised by the parties themselves.[59]

44. In its order dismissing a motion by the Women's Legal Education and Action Fund Inc. ("LEAF") for leave to intervene in this appeal, this Court noted in *obiter* "that LEAF's motion for intervention is late." This Court went on to observe that interveners with a "valuable perspective" tend to make motions for leave to intervene as soon as the notice of appeal is filed. However, in its disposition of that motion, this Court held that LEAF's proposed intervention did not relate "to the defined issues in the proceeding" and that LEAF had failed to explain the timing of its motion.[60]

45. In contrast, CCPI/CHC has explained the timing of their motion: they waited until the memoranda of fact and law had been issued by each of the Appellants and Respondents, studied both carefully, and made the decision to seek leave of this Court with proposed intervention submissions that are directly connected to the issues in this appeal, and yet offer this Court a perspective that is distinct from the immediate parties. Similarly, this Court granted leave to the interveners in *Pictou* after the memoranda of fact and law of both the appellants and respondents had been filed in that appeal. It was with the benefit of those pleadings that this Court set out and

[59] CCPI/CHC BoA, Tab 6: *Pictou*, *supra* note 35 at paras. 10-11 and 32.
[60] CCPI/CHC BoA, Tab 1: Dismissal of LEAF motion, *supra* note 37 at paras. 22, 27-29.

applied its test for intervention applications – particularly the requirement that a proposed intervener advance *different* insights and perspectives from those of the immediate parties.[61]

46. The Supreme Court's discussion of procedural discretion in *Hryniak* also places this branch of the *Pictou* test in appropriate context. Considerations of undue delay, complexity, and cost that "now pervade the interpretation and application of procedural rules"[62] are driven, in part if not in full, by a broader goal of access to justice, due to how unaffordable civil litigation has become to most Canadians.[63] The choice before this Court is whether to consider the proper interpretation of section 7 of the *Charter* (as it applies to public health care) with, or without, the benefit of argument from the perspectives of poor people living in Canada. CCPI/CHC submits that even if the proposed intervention causes minor delay in the appeal, that delay would be outweighed by the intervention's facilitation of access to justice.

47. As it has been carefully timed to avoid duplication of argument before this Court, the proposed CCPI/CHC intervention would be consistent with securing a just, expeditious, and efficient determination of this proceeding and is therefore not inconsistent with the imperatives of Rule 3 of the *Federal Court Rules*. This motion indicates, *inter alia*, that CCPI/CHC will seek neither to add to the record nor to claim costs, and is prepared to abide by strict terms which may be imposed by this Court.

48. To further reduce any possible delay, CCPI/CHC hereby waives any right of reply on this motion under Rule 369(3)[64] and relies solely upon these submissions.

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[61] CCPI/CHC BoA, Tab 6: *Pictou, supra* note 35 at para. 22.
[62] CCPI/CHC BoA, Tab 6:*Ibid* at para. 10.
[63] CCPI/CHC BoA, Tab 4: *Hryniak, supra* note 55 at paras. 24-25.
[64] *Federal Court Rules*, SOR/98-106.

PART IV – ORDER SOUGHT

49. CCPI/CHC respectfully requests an order granting them leave to intervene in this appeal, pursuant to Rule 109 of the *Federal Court Rules*.

50. If this Honourable Court determines that leave should be granted, CCPI/CHC respectfully requests permission to file written submissions and the right to present oral argument at the hearing of this appeal.

51. If this Honourable Court determines that leave should be granted, CCPI/CHC respectfully requests a further order that the intervener may neither seek costs, nor have costs awarded against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

9 March, 2015

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SCHEDULE "A" – AUTHORITIES

	CASE LAW
1.	*Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, [2015] F.C.J. No. 147.
2.	*Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, 2000 FCA 233, [2010] 1 F.C.R. 226.
3.	*Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236, 233 A.C.W.S. (3d) 47.
4.	*Hryniak v. Mauldin*, 2014 SCC 7, [2014] S.C.R. 87.
5.	*Toussaint v. Canada (Minister of Citizenship and Immigration)* (March 18 2009, unreported), Toronto IMM-2926-08, IMM-3045-08, IMM-326-09 (FC).
6.	*Pictou Landing Band Council v. Canada (Attorney General)*, 2014 FCA 21, 237 A.C.W.S. (3d) 570.
7.	*Tanudjaja v. Canada (Attorney General)* (March 31 2014, unreported), Toronto M43540, M43549, M43525, M43545, M43551, M43534, M43547 (C57714) (ONCA).

SCHEDULE "B" – RULES

Federal Court Rules (SOR/98-106)		**Règles des Cours fédérales** (DORS/98-106)	
General principle	**3.** These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	**3.** .Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et laplus expéditive et économique possible.	Principe général
	Intervention	*Interventions*	
Leave to intervene	**109.** (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109.** (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.	Autorisation d'intervenir
Contents of notice of motion	(2) Notice of a motion under subsection (1) shall (*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and (*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir : *a*) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant; *b*) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.	Avis de requête
Directions	(3) In granting a motion under subsection (1), the Court shall give directions regarding (*a*) the service of documents; and (*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	(3) La Cour assortit l'autorisation d'intervenir de directives concernant : *a*) la signification de documents; *b*) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.	Directives de la Cour

FEDERAL COURT OF APPEAL

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Court File No. A-407-14

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

-and-

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH

Respondents

BOOK OF AUTHORITIES

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Court File No. A-407-14

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION

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-and-

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH

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1.	*Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, [2015] F.C.J. No. 147.
2.	*Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, 2000 FCA 233, [2010] 1 F.C.R. 226.
3.	*Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236, 233 A.C.W.S. (3d) 47.
4.	*Hryniak v. Mauldin*, 2014 SCC 7, [2014] S.C.R. 87. (excerpted)
5.	*Toussaint v. Canada (Minister of Citizenship and Immigration)* (March 18 2009, unreported), Toronto IMM-2926-08, IMM-3045-08, IMM-326-09 (FC).
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7.	*Tanudjaja v. Canada (Attorney General)* (March 31 2014, unreported), Toronto M43540, M43549, M43525, M43545, M43551, M43534, M43547 (C57714) (ONCA).

Federal Court of Appeal  Cour d'appel fédérale

Date: 20150202

Docket: A-407-14

Citation: 2015 FCA 34

Present: **STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA and
MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

and

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI and JUSTICE FOR CHILDREN AND YOUTH

Respondents

and

REGISTERED NURSES' ASSOCIATION OF ONTARIO and
CANADIAN ASSOCIATION OF COMMUNITY HEALTH CENTRES

Interveners

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 2, 2015.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20150202

Docket: A-407-14

Citation: 2015 FCA 34

Present: **STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

and

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI and JUSTICE FOR CHILDREN AND YOUTH

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and

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Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] The Women's Legal Education and Action Fund Inc. ("LEAF") seeks leave to intervene in this appeal.

[2] The appeal is from the Federal Court's judgment (2014 FC 651) that, among other things, declared Orders in Council P.C. 2012-433 and P.C. 2012-945 inconsistent with section 12 of the Charter (the right against cruel and unusual treatment or punishment) and section 15 of the Charter (the right to equality). The two Orders in Council enacted the Interim Federal Health Program for refugees.

[3] LEAF submits that if it is allowed to intervene, it will make useful, necessary, and valuable submissions on the section 15 issues.

A. The nature of this appeal and LEAF's intended contribution to it

[4] When faced with a request for intervener status, the Court must first determine what is truly in issue in this appeal and examine how the intervention relates to those issues.

[5] On the section 15 issue, the appellant's notice of appeal simply states that the Federal Court erred. However, the reasons of the Federal Court and the memorandum of fact and law filed by the appellant in this Court give us a clearer picture of the section 15 issues.

[6] In the Federal Court, the Canadian Doctors for Refugee Care, *et al.* attacked the Orders in Council under section 15 on the ground that they draw a distinction between classes of refugee claimants based upon their country of origin. They said that the Orders in Council provide a lower level of health insurance coverage to individuals coming from certain countries than to those coming from others. As well, they said that the Orders in Council treat individuals who are lawfully in Canada for the purpose of seeking protection differently from other legal residents in Canada who are provided with health insurance benefits by the government. The Attorney General and the Minister of Citizenship and Immigration disagreed. The Federal Court found substantially in favour of the Canadian Doctors For Refugee Care, *et al.* The Attorney General and the Minister of Citizenship and Immigration now appeal.

[7] LEAF alleges that this appeal raises important substantive equality questions under section 15 of the Charter including "the gendered impacts of the 2012 changes to the Interim Federal Health Program, which creates a unique discriminatory effect for refugee women."

[8] More generally, LEAF suggests that this appeal raises general questions about how "laws and policies that create a distinction among [certain] groups may [also] have a particularly adverse impact on people such as refugee women." Refugee women may "experience greater and distinctive effects of inequality."

[9] LEAF adds that it is well-placed to assist on these issues because it has "particular expertise regarding how women's experiences of inequality are shaped by the intersection of multiple prohibited grounds." It can contribute on "the impact of any approach to s. 15 analysis

on refugee women who may not share all the characteristics of the individual respondents in this case." And, for good measure, "[t]his is a critical perspective given that none of the applicants in this case were women, but 51% of the refugee claimants in Canada are women." Finally, allowing LEAF to make submissions on the "gendered dimensions of this appeal" will further "access to justice for refugee women."

[10] More generally, LEAF submits that "[t]he way courts approach these issues affects how they evaluate Charter claims and this in turn affects the protection of equality rights more broadly." As a result, LEAF "has an interest in this appeal and the Charter issues it raises."

B. The test for intervention

[11] The traditional test is set out in cases such as *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 at paragraph 12 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.). 74 and *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [2010] 1 F.C.R. 226. However, some branches of that test pose conceptual problems and leave out certain relevant considerations: *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, 456 N.R. 365 at paragraphs 6-10.

[12] The appellants exclusively invoke *Pictou*, while LEAF exclusively invokes the *Rothmans, Benson & Hedges* and *Canadian Airlines* line of cases.

[13] *Pictou* sets out a test that is phrased differently from the former test, but both tests essentially capture the same basic idea – that the decision whether a party should be allowed to intervene is a discretionary one based on the criteria in Rule 109 and the general principles in Rule 3 of the *Federal Courts Rules*, SOR/98-106, the particular evidence on the motion, and the nature of the proceeding before the Court.

[14] In this particular case, I do not believe that the rival tests would achieve a different outcome. For the reasons I expressed in *Pictou*, I do prefer the modification of the older *Rothmans, Benson & Hedges* and *Canadian Airlines* tests. Therefore, I shall apply the test in *Pictou*.

[15] The test is as follows:

I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary

knowledge, skills and resources and will dedicate them to the matter before the Court?

III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

(*Pictou*, *supra* at paragraph 11.)

C. Applying the test for intervention

[16] I acknowledge LEAF's helpful interventions in many cases, particularly in those concerning gender discrimination.

[17] I also acknowledge that the reasons and judgment below have received public attention and that often in such cases, "the matter [has] assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court": *Pictou*, *supra* at paragraph 11.

[18] But the new perspectives offered by a proposed intervener must be tied to an issue in the proceeding. Specifically Rule 109(2)(*b*) requires the proposed intervener to show how it will assist in the determination of a factual or legal issue related to the proceeding.

[19] Notices of application and notices of appeal serve to define the issues in a proceeding. Existing parties build their evidence and submissions around those carefully defined issues. An outsider seeking admission to the proceedings as an intervener has to take those issues as it finds them, not transform them or add to them. Thus, under Rule 109(2)(*b*) a proposed intervener must show its potential contribution to the advancement of the issues on the table, not how it will change the issues on the table.

[20] This, of course, is consistent with the approach of appellate courts to new issues. A party cannot raise a new issue in circumstances where the factual record is not adequate to support it or

where the factual record might have been different had the issue been raised below: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678.

[21] This is of special concern in Charter cases: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873 at paragraph 28. The judgments and reasons of courts in Charter cases can have the effect of removing or limiting areas of legislative and executive power. It is most important, then, that those judgments and reasons be based on the issues defined in the originating document. Those are the issues on which the parties have filed evidence and have tested. Those are the issues the parties have researched and have written up in their memoranda of fact and law. In this Court, those are the issues the court and/or administrative decision-maker below has decided in carefully considered reasons.

[22] LEAF has not persuaded me that its proposed submissions are related to the defined issues in this proceeding. Nor has it persuaded me that its submissions will assist this Court in determining the defined issues.

[23] LEAF wishes to raise issues of gender. But issues of gender are not present in this proceeding as framed.

[24] LEAF suggests that the Orders in Council have a "gendered impact." But that is a conclusion of fact that cannot be assumed but rather must be based on evidence: *Métis National*

Council of Women v. Canada (Attorney General), 2005 FC 230, [2005] 4 F.C.R. 272, aff'd 2006 FCA 77, 348 N.R. 83. And this Court, in an appeal, cannot normally make conclusions of fact.

[25] I do understand the issue of intersectionality that LEAF would like to raise – the fact that in some section 15 cases the intersection of multiple prohibited grounds can play an important role in the analysis. But intersectionality is a legal element dependent on evidence. An appeal court cannot go into that issue unless there is a factual basis for it and unless the parties had notice of the issue in the court below and had a full opportunity to adduce evidence relevant to it.

[26] If intersectionality had been a live issue below, the parties might have adduced evidence on it. While there is some evidence in the record pertaining to female refugees, more evidence might have been called in the Federal Court if intersectionality were front and centre there.

[27] Aside from the foregoing, I note that LEAF's motion for intervention is late.

[28] In my experience, those who have a valuable perspective to offer to an appeal court jump off the starting blocks when they hear the starter's pistol. Keen for their important viewpoint to be heard, soon after the notice of appeal is filed, they move quickly.

[29] In this case, the appellants have filed their memorandum and the respondents' memoranda are imminent. The judgment and reasons of the Federal Court, released seven months ago, attracted great attention, but only now does LEAF apply to intervene. LEAF has not explained the delay. Here, LEAF's admission to the appeal and its filing of a memorandum

would mean that the parties would have to respond in extra memoranda – an avoidable consequence if LEAF had proceeded faster.

[30] Finally, LEAF's interest in this case is purely jurisprudential, nothing more. At points in its written submissions, it stressed that cases that do not involve gender equality can affect the gender equality jurisprudence. I accept that. But that sort of interest – merely a jurisprudential interest – is insufficient to intervene. It would be like admitting a pharmaceutical company into a case involving patents simply because it has patents and is very interested in the development of the jurisprudence. That we do not do: *Canadian Airlines, supra at* paragraph 11.

[31] I dismiss the motion to intervene.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-407-14
STYLE OF CAUSE:	**ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION v. CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI and JUSTICE FOR CHILDREN AND YOUTH and REGISTERED NURSES' ASSOCIATION OF ONTARIO and CANADIAN ASSOCIATION OF COMMUNITY HEALTH CENTRES**

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	FEBRUARY 2, 2015

WRITTEN REPRESENTATIONS BY:

David Tyndale Neeta Logsetty Hillary Adams	FOR THE APPELLANTS
Kim Stanton Alison J. Gray E. Bruce Mellett	FOR THE PROPOSED INTERVENERS, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

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Women's Legal Education and Action Fund Inc. Toronto, Ontario Bennett Jones LLP Calgary, Alberta	FOR THE PROPOSED INTERVENERS, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

Canadian Airlines International Limited and **Air Canada** (*Appellants*)

v.

Canadian Human Rights Commission, Canadian Union of Public Employees (Airline Division) and **Public Service Alliance of Canada** (*Respondents*)

INDEXED AS: CANADIAN AIRLINES INTERNATIONAL LTD. v. CANADA (HUMAN RIGHTS COMMISSION) (F.C.A.)

Federal Court of Appeal, Richard C.J., Létourneau and Noël JJ.A.—Montréal, February 15, 2000.

* Editor's Note: Although this judgment was not selected for full-text publication after it was rendered on February 15, 2000, because it is frequently cited by both counsel and the Federal Courts, it is now being published in the *Federal Courts Reports* in order to facilitate access to the profession.

Practice — Parties — Intervention — Appeal from interlocutory decision of Federal Court Trial Division granting Public Service Alliance of Canada (PSAC) leave to intervene in judicial review applications pertaining to Canadian Human Rights Tribunal decision — Motions Judge providing no reasons for order granting leave — Relevant factors to consider in determining whether to grant intervention set out herein — PSAC failing to demonstrate how expertise would assist in determination of issues placed before Court by parties —PSAC's interest "jurisprudential" in nature — Such interest alone not justifying application to intervene — Without benefit of motion Judge's reasoning, not possible to see how intervention could have been granted without falling into error — Appeal allowed.

STATUTES AND REGULATIONS CITED

Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 11.
Federal Court Rules, 1998, SOR/98-196, r. 109.

CASES CITED

REFERRED TO:

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General), [1990] 1 F.C. 74, (1989), 41 Admin. L.R. 102, 29 F.T.R. 267 (T.D.); *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 84, (1989), 41 Admin. L.R. 155, 29 F.T.R. 272 (T.D.); *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, (1989), 45 C.R.R. 382, 103 N.R. 391 (C.A.); *R. v. Bolton*, [1976] 1 F.C. 252 (C.A.); *Tioxide Canada Inc. v. Canada*, [1995] 1 C.T.C. 285, (1994), 94 DTC 6655, 174 N.R. 212 (F.C.A.).

APPEAL from an interlocutory decision of the Federal Court—Trial Division granting the Public Service Alliance of Canada leave to intervene in judicial review applications pertaining to a decision

of the Canadian Human Rights Tribunal (*Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [1998] C.H.R.D. No. 8 (QL)). Appeal allowed.

APPEARANCES

Peter M. Blaikie for appellants.
Andrew J. Raven for respondent Public Service Alliance of Canada.

SOLICITORS OF RECORD

Heenan Blaikie, Montréal, for appellants.
Raven, Allen, Cameron & Ballantyne, Ottawa, for respondent Public Service Alliance of Canada.

The following are the reasons for judgment rendered in English by

[1] NOËL J.A.: This is an appeal from an interlocutory decision of the Trial Division granting the Public Service Alliance of Canada (PSAC) leave to intervene in the judicial review applications brought by the Canadian Human Rights Commission (the Commission) and the Canadian Union of Public Employees (Airline Division) (CUPE). These judicial review applications pertain to a decision of the Canadian Human Rights Tribunal (the Tribunal) [*Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [1998] C.H.R.D. No. 8 (QL)] rejecting a complaint by CUPE, that the appellants paid discriminatory wages to their flight attendants, pilots and technical operations personnel.

[2] By this decision, the Tribunal held *inter alia* that the above-described employees of Air Canada and Canadian Airlines International Limited (Canadian) work in separate "establishments" for the purposes of section 11 of the *Canadian Human Rights Act* [R.S.C., 1985, c. H-6] since they are subject to different wage and personnel policies.

[3] PSAC did not seek to intervene in the proceedings before the Tribunal.

[4] The Tribunal's decision was released on December 15, 1998. The Commission and CUPE filed judicial review applications on January 15, 1999, and PSAC's application for leave to intervene was filed on May 6, 1999. The sole issue with respect to which leave to intervene was sought is whether the pilots, flight attendants and technical operations personnel employed by Air Canada and Canadian respectively are in the same "establishment" for the purposes of section 11 of the Act.

[5] The order allowing PSAC's intervention was granted on terms but without reasons. The order reads:

The Public Service Alliance of Canada (the Alliance) is granted leave to intervene on the following basis:

(a) the Alliance shall be served with all materials of the other parties;

(b) the Alliance may file its own memorandum of fact and law by June 14, 1999, being within 14 days of the date for serving and filing the Respondent Canadian Airlines International Limited and the Respondent Air Canada's memoranda of fact and law as set out in the order of Mr. Justice Lemieux, dated March 9, 1999;

(c) the Applicant Canadian Union of Public Employees (Airline Division) and the Applicant Canadian Human Rights Commission and the Respondents Canadian Airlines International Limited and Air Canada may file a reply to the Alliance's memorandum of fact and law by June 28, 1999, being 14 days from the date of service of the Alliance's memorandum of fact and law;

(d) the parties' right to file a requisition for trial shall not be delayed as a result of the Alliance's intervention in this proceeding;

(e) the Alliance shall be consulted on hearing dates for the hearing of this matter;

(f) the Alliance shall have the right to make oral submissions before the Court.

[6] In order to succeed, the appellants must demonstrate that the motions Judge misapprehended the facts or committed an error of principle in granting the intervention. An appellate court will not disturb a discretionary order of a motions judge simply because it might have exercised its discretion differently.

[7] In this respect, counsel for PSAC correctly points out that the fact that the motions Judge did not provide reasons for her order is no indication that she failed to have regard to the relevant considerations. It means however that this Court does not have the benefit of her reasoning and hence no deference can be given to the thought process which led her to exercise her discretion the way she did.

[8] It is fair to assume that in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:[1]

(1) Is the proposed intervener directly affected by the outcome?

(2) Does there exist a justiciable issue and a veritable public interest?

(3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(4) Is the position of the proposed intervener adequately defended by one of the parties to the case?

(5) Are the interests of justice better served by the intervention of the proposed third party?

(6) Can the Court hear and decide the case on its merits without the proposed intervener?

[9] She also must have had in mind rule 109 of the *Federal Court Rules, 1998* [SOR/98-106] and specifically subsection (2) thereof which required PSAC to show in the application before her how the proposed intervention "will assist the determination of a factual or legal issue related to the proceeding."

[10] Accepting that PSAC has acquired an expertise in the area of pay equity, the record reveals that:

1. PSAC represents no one employed by either of the appellant airlines;

2. the Tribunal's decision makes no reference to any litigation in which PSAC was or is engaged;

3. the grounds on which PSAC has been granted leave to intervene are precisely those which both the Commission and CUPE intend to address;

4. nothing in the materials filed by PSAC indicates that it will put or place before the Court any case law, authorities or viewpoint which the Commission or CUPE are unable or unwilling to present.

[11] It seems clear that at its highest PSAC's interest is "jurisprudential" in nature; it is concerned that the decision of the Tribunal, if allowed to stand, may have repercussions on litigation involving pay equity issues in the future. It is well established that this kind of interest alone cannot justify an application to intervene.[2]

[12] Beyond asserting its expertise in the area of pay equity, it was incumbent upon PSAC to show in its application for leave what it would bring to the debate over and beyond what was already available to the Court through the parties. Specifically, it had to demonstrate how its expertise would be of assistance in the determination of the issues placed before the Court by the parties. This has not been done. Without the benefit of the motion Judge's reasoning, we can see no basis on which she could have granted the intervention without falling into error.

[13] The appeal will be allowed, the order of the motions Judge granting leave to intervene will be set aside, PSAC's application for leave to intervene will be dismissed and its memorandum of fact and law filed on June 14, 1999, will be removed from the record. The appellants will be entitled to their costs on this appeal.

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[1] *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (T.D.), at pp. 79–83; *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 84 (T.D.), at p. 88; *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90 (C.A.).

[2] See *R. v. Bolton*, [1976] 1 F.C. 252 (C.A.) (*per* Jackett C.J.); *Tioxide Canada Inc. v. Canada*, [1995] 1 C.T.C. 285 (F.C.A.) (*per* Hugessen J.A.).

Federal Court of Appeal | Cour d'appel fédérale

Date: 20131004

Docket: A-273-13

Citation: 2013 FCA 236

Present: **STRATAS J.A.**

BETWEEN:

FOREST ETHICS ADVOCACY ASSOCIATION AND DONNA SINCLAIR

Applicants

and

THE NATIONAL ENERGY BOARD AND THE ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 4, 2013.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20131004

Docket: A-273-13

Citation: 2013 FCA 236

Present: **STRATAS J.A.**

BETWEEN:

FOREST ETHICS ADVOCACY ASSOCIATION AND DONNA SINCLAIR

Applicants

and

THE NATIONAL ENERGY BOARD AND THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] Enbridge Pipelines Inc. and Valero Energy Inc. each move for an order adding it as a party respondent in this application for judicial review. In the alternative, they each move for an order adding it as an intervener.

A. The nature of the application for judicial review

[2] The application for judicial review comes to this Court under paragraph 28(1)(*f*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. It arises from proceedings before the National Energy Board.

[3] The proceedings before the National Energy Board concern Enbridge's application to the Board for approval to expand the capacity of a pipeline and to reverse a segment of that pipeline. Also included in Enbridge's application is a request to allow the pipeline to transport bitumen, the petroleum product derived from the Alberta oil sands. The Board's proceedings are ongoing.

[4] The application for judicial review targets a section recently added to the *National Energy Board Act*, R.S.C. 1985, c. N-7, and the Board's interpretation and application of that section.

[5] The section, section 55.2, affects who may make representations to the Board. Section 55.2 reads as follows:

55.2. On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive.	**55.2.** Si une demande de certificat est présentée, l'Office étudie les observations de toute personne qu'il estime directement touchée par la délivrance du certificat ou le rejet de la demande et peut étudier les observations de toute personne qui, selon lui, possède des renseignements pertinents ou une expertise appropriée. La décision de l'Office d'étudier ou non une observation est définitive.

[6] In their notice of application in this Court, the applicants say that the Board interpreted its power under this section "to create a rigorous application process for those individuals and groups who seek to participate in [the Board's] proceedings." Among other things, the Board required those intending to participate to complete a detailed form.

[7] The applicants, Forest Ethics Advocacy Association and Donna Sinclair, are, respectively, an environmental organization and an individual. The Board denied Donna Sinclair the right to submit a letter of comment on Enbridge's application for approval. The applicants seek a declaration that section 55.2 violates the guarantee of freedom of expression in subsection 2(*b*) of the Charter and, thus, is invalid. They also seek an order setting aside the Board's decision to issue the form and require that it be completed, and an injunction preventing the Board from acting until the judicial review has been decided. Finally, they seek an order requiring the Board to accept all letters of comment from those wanting to participate in the proceedings.

[8] Enbridge, the applicant for approval before the Board, is the proponent of the pipeline project under scrutiny. Valero is an intervener in the Board's proceedings, supporting Enbridge's application for approval. Valero stands to benefit from a Board approval of Enbridge's application. Approval would permit Valero to receive western Canadian crude oil, oil that is cheaper than that from offshore sources. To that end, Valero has entered into a transportation services agreement with Enbridge, contingent upon the approval of Enbridge's project. Valero plans to invest between $110 million and $200 million to upgrade its facilities in order to handle the anticipated supply of western Canadian crude oil.

B. The provisions of the *Federal Courts Rules* that govern these motions

[9] Three provisions in the *Federal Courts Rules*, SOR/98-106, govern the motions before me: Rule 104(1)(*b*) (adding a party); Rule 109(1) and (2) (intervening in proceedings); and Rule 303(1)(*a*) (who must be named as a respondent to an application for judicial review).

[10] These Rules read as follows:

104. (1) At any time, the Court may	**104.** (1) La Cour peut, à tout moment, ordonner :
…	…
(*b*) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.	*b*) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne.
109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109.** (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
(2) Notice of a motion under subsection (1) shall	(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

(*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

303. (1) Subject to subsection (2), an applicant shall name as a respondent every person

(*a*) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; …

303. (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :

a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;…

C. Should Enbridge and Valero be added as respondents?

[11] Under Rule 104(1)(*b*), parties may be added as respondents where

(1) they should have been respondents in the first place; or

(2) their presence before the Court is necessary.

Satisfaction of either of these requirements is sufficient. Enbridge and Valero say they satisfy both requirements.

(1) Should Enbridge and Valero have been respondents in the first place?

[12] Whether Enbridge and Valero should have been respondents in the first place is determined by Rule 303(1)(*a*). Under that rule, those who are "directly affected" by the order sought in the application for judicial review must be named as respondents.

[13] What is the meaning of "directly affected" in Rule 303(1)(*a*)? There are very few authorities on point.

[14] All parties cite the order made by this Court in *Sweetgrass First Nation v. National Energy Board*, file 08-A-30 (May 30, 2008) but that order does not shed light on the meaning of "directly affected" in Rule 303(1)(*a*).

[15] All parties cite *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2008 FC 735. However, that case is of limited usefulness. In *Brokenhead*, the Federal Court did not examine in any detail the words "directly affected."

[16] Further, most of the cases placed before the Federal Court in *Brokenhead* were decided under Rule 1602(3) of the old *Federal Court Rules*, C.R.C. 1978, c. 663 (now repealed) or relied upon cases interpreting old Rule 1602(3). But old Rule 1602(3) is quite different from today's Rule 303(1)(*a*).

[17] Old Rule 1602(3) required that an "interested person who [was] adverse in interest to the applicant" before the tribunal being reviewed be named as a respondent. Rule 303(1)(*a*) is narrower, requiring that a party be "directly affected" by the order sought in the application for judicial review. Accordingly, cases based on old Rule 1602(3) should be regarded with caution.

[18] The words "directly affected" in Rule 303(1)(*a*) mirror those in subsection 18.1(1) of the *Federal Courts Act*. Under that subsection, only the Attorney General or "anyone directly affected by the matter in respect of which relief is sought" may bring an application for judicial review. Rule 303(1)(*a*) restricts the category of parties who must be added as respondents to those who, if the tribunal's decision were different, could have brought an application for judicial review themselves.

[19] Accordingly, guidance on the meaning of "direct interest" in Rule 303(1)(*a*) can be found in the case law concerning the meaning of "direct interest" in subsection 18.1(1) of the *Federal Courts Act*. This was the approach of the Federal Court in *Reddy-Cheminor, Inc. v. Canada*, 2001 FCT 1065, 212 F.T.R. 129, aff'd 2002 FCA 179, 291 F.T.R. 193 and seems to have been the approach implicitly adopted by the Federal Court in *Cami International Poultry Inc. v. Canada (Attorney General)*, 2013 FC 583 at paragraphs 33-34.

[20] A party has a "direct interest" under subsection 18.1(1) of the *Federal Courts Act* when its legal rights are affected, legal obligations are imposed upon it, or it is prejudicially affected in some direct way: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307 at

paragraphs 57-58; *Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.)*, [1976] 2 F.C. 500 (C.A.); *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116.

[21] Translating this to Rule 303(1)(*a*), the question is whether the relief sought in the application for judicial review will affect a party's legal rights, impose legal obligations upon it, or prejudicially affect it in some direct way. If so, the party should be added as a respondent. If that party was not added as a respondent when the notice of application was issued, then, upon motion under Rule 104(1)(*b*), it should be added as a respondent.

[22] The relief sought in the judicial review is described in paragraph 7, above. The interests of Enbridge and Valero are described in paragraph 8, above.

[23] I accept that the relief sought in the judicial review, if granted, would cause real, tangible prejudice to Enbridge and Valero within the meaning of the *Odynsky* test, not just general inconvenience or general impact on their businesses as a result of detrimental or unhelpful jurisprudence. But Enbridge and Valero must go further under the *Odynsky* test and show that they will be prejudiced in a direct way.

[24] In Enbridge's case, the prejudice is direct. The Board's proceeding is about whether Enbridge's project should be approved. If the relief sought in the judicial review is granted, the proceedings before the Board will have to be rerun to some extent, delaying Enbridge's project. Further, if the relief sought is granted, potentially many persons and organizations from different perspectives will have rights of participation where, before, they did not. The Board might accept

some of the new participants' arguments, leading to the rejection of Enbridge's application for approval of its project. The risk of that happening directly affects Enbridge, the proponent of the project.

[25] Valero, however, stands in a different position. It is in a commercial relationship with Enbridge, the proponent of the project. The success of that relationship depends upon the approval of the project. But it is not itself the proponent of the project.

[26] Those in a commercial relationship with the proponent of a project who stand to gain from the approval of the project of course will suffer financially if the project is not approved. But that financial interest is merely consequential or indirect.

[27] Valero stands in the same position as any suppliers of materials for the project and any workers involved in the construction of the project. The project will provide them with income and work. But if it is not approved, it will not go forward, and the income and work will be lost. Their interests, no doubt significant, are consequential or indirect, contingent on the proponent of the project getting its approval.

[28] One way to test this result is to consider a hypothetical situation and the concept of "direct interest" under subsection 18.1(1) of the *Federal Courts Act*. Suppose that the Board rules against Enbridge's application for approval. Suppose that Enbridge decides not to bring an application for judicial review. In those circumstances, could Valero maintain that since it stood to benefit economically from the approval it has a "direct interest" and, thus, has standing to bring an

application for judicial review? Could all others who also stood to benefit economically in some way from the pipeline approval – construction companies and their employees, suppliers and transporters of construction materials, potential buyers of refined petroleum products – say the same thing? I think not.

[29] I do not doubt that Valero's interest is most significant: see Exhibit "A" to the Affidavit of Louis Bergeron. However, Rule 303(1)(*a*) refers to a "direct interest," not a "significant interest." Valero does not have a "direct interest" and so it could not have been named as a respondent in the first place.

(2) Is Valero's presence in the judicial review necessary?

[30] Valero also submits that it should now be a respondent in the judicial review because it falls under the second branch of under Rule 104(1)(*b*): its presence before the Court is "necessary to ensure that all matters in dispute in the application for judicial review may be effectually and completely determined."

[31] To succeed in this submission, Valero must satisfy the demanding test of necessity set out in cases such as *Shubenacadie Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 509, 236 F.T.R. 160 and *Laboratoires Servier v. Apotex Inc.*, 2007 FC 1210.

[32] In my view, Valero has not satisfied that test. It has not pointed to "a question in the [application for judicial review] which cannot be effectually and completely settled unless [it] is a party": *Shubenacadie Indian Band, supra* at paragraph 8, citing *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357 at page 380.

[33] Therefore, Valero's motion to be added as a respondent must fail.

D. Should Valero be permitted to intervene?

[34] As we have seen, not all parties before an administrative tribunal will be parties with a "direct interest" or necessary for the judicial review – in other words, not all parties will be entitled to be respondents in the application for judicial review. But many may be able to satisfy the test for intervention and become interveners in the judicial review. Their level of participation as interveners varies depending on the circumstances. Where warranted, their level of participation can approach that of respondents. The grand prize of being a respondent is one thing. But the consolation prize of being an intervener is often not bad.

[35] Mindful of this, Valero seeks an order permitting it to intervene in the judicial review. However, Valero has failed to discharge the legal burden of proof upon it.

[36] Under Rule 109(2)(*b*), Valero must describe "how [its] participation will assist the determination of a factual or legal issue related to the proceeding." This requires not just an

assertion that its participation will assist, but a *demonstration* of *how* it will assist. Valero has not done this.

[37] In its notice of motion, Valero submits that "there is a justiciable issue and a veritable public interest that could benefit from Valero's participation in this proceeding." This does not discharge the burden of proof imposed upon it by Rule 109(2)(*b*).

[38] In the affidavit offered in support of its motion, Valero asserts that it "has a perspective which is unique and distinct from that of Enbridge" as "a refiner which proposes to access western crude" through the pipeline. Valero does not explain how a refiner's perspective differs from that of a pipeline builder and how that difference will assist in determining the administrative law and constitutional law issues before the Court.

[39] Finally, in its written submissions, Valero asserts – without explanation – that the "interests of justice would be served" and the Court "would [be] assist[ed]…in coming to a fair and just conclusion" by allowing it to intervene. It says nothing more. The Court is left to speculate as to what role Valero would play as an intervener and whether that role would be of any assistance at all.

E. Disposition of the motions

[40] Enbridge Pipelines Inc. shall be added as a party respondent and the style of cause shall be amended to reflect that fact. It shall receive its costs of the motion in any event of the cause. The motion of Valero Energy Inc. shall be dismissed with costs in any event of the cause.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-273-13

STYLE OF CAUSE: FOREST ETHICS ADVOCACY ASSOCIATION AND DONNA SINCLAIR v. THE NATIONAL ENERGY BOARD AND THE ATTORNEY GENERAL OF CANADA

MOTIONS DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: STRATAS J.A.

DATED: OCTOBER 4, 2013

WRITTEN REPRESENTATIONS BY:

Joshua A. Jantzi	FOR THE PROPOSED RESPONDENTS, Enbridge Pipelines Inc.
Paul Edwards	FOR THE PROPOSED RESPONDENTS, Valero Energy Inc.
Clayton Ruby Nader R. Hasan	FOR THE APPLICANTS

SOLICITORS OF RECORD:

Dentons Canada LLP Calgary, Alberta	FOR THE PROPOSED RESPONDENTS, Enbridge Pipelines Inc.

Gowling Lafleur Henderson LLP Calgary, Alberta	FOR THE PROPOSED RESPONDENTS, VALERO ENERGY INC.
Ruby Shiller Chan Hasan Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA
The National Energy Board Calgary, Alberta	FOR THE RESPONDENT, NATIONAL ENERGY BOARD

SUPREME COURT OF CANADA

CITATION: Hryniak *v*. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87 **DATE:** 20140123
DOCKET: 34641

BETWEEN:

Robert Hryniak
Appellant
and
Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith
Respondents
- and -
Ontario Trial Lawyers Association and Canadian Bar Association
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 96) Karakatsanis J. (McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell and Wagner JJ. concurring)

Hryniak *v*. Mauldin, 2014 CSC 7, [2014] 1 R.C.S. 87

Robert Hryniak *Appellant*

v.

Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith *Respondents*

and

Ontario Trial Lawyers Association and Canadian Bar Association *Interveners*

Indexed as: Hryniak *v.* Mauldin

2014 SCC 7

File No.: 34641.

2013: March 26; 2014: January 23.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Summary judgment — Investors bringing action in civil fraud and subsequently bringing a motion for summary judgment — Motion judge granting summary judgment — Purpose of summary judgment motions — Access to justice — Proportionality — Interpretation of recent amendments to

Ontario Rules of Civil Procedure — Trial management orders — Standard of review for summary judgment motions — Whether motion judge erred in granting summary judgment — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20.

In June 2001, two representatives of a group of American investors met with H and others to discuss an investment opportunity. The group wired US$1.2 million, which was pooled with other funds and transferred to H's company, Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank and the money disappeared. The investors brought an action for civil fraud against H and others and subsequently brought a motion for summary judgment. The motion judge used his powers under Rule 20.04(2.1) of the Ontario *Rules of Civil Procedure* (amended in 2010) to weigh the evidence, evaluate credibility, and draw inferences. He concluded that a trial was not required against H. Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that H had committed the tort of civil fraud against the investors, and therefore dismissed H's appeal.

Held: The appeal should be dismissed.

Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair

APPEAL from a judgment of the Ontario Court of Appeal (Winkler C.J.O. and Laskin, Sharpe, Armstrong and Rouleau JJ.A.), 2011 ONCA 764, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 14 C.P.C. (7th) 242, 13 R.P.R. (5th) 167, 93 B.L.R. (4th) 1, 344 D.L.R. (4th) 193, 10 C.L.R. (4th) 17, [2011] O.J. No. 5431 (QL), 2011 CarswellOnt 13515 (*sub nom. Combined Air Mechanical Services Inc. v. Flesch*), affirming a decision of Grace J., 2010 ONSC 5490, [2010] O.J. No. 4661 (QL), 2010 CarswellOnt 8325. Appeal dismissed.

Sarit E. Batner, *Brandon Kain* and *Moya J. Graham*, for the appellant.

Javad Heydary, *Jeffrey D. Landmann*, *David K. Alderson*, *Michelle Jackson* and *Jonathan A. Odumeru*, for the respondents.

Allan Rouben and *Ronald P. Bohm*, for the intervener the Ontario Trial Lawyers Association.

Paul R. Sweeny and *David Sterns*, for the intervener the Canadian Bar Association.

The judgment of the Court was delivered by

[1] KARAKATSANIS J. — Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend

themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

[2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[3] Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (Ontario *Rules* or Rules) to increase access to justice. This appeal, and its companion, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, address the proper interpretation of the amended Rule 20 (summary judgment motion).

[4] In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair

and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

[6] As the Court of Appeal observed, the inappropriate use of summary judgment motions creates its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

[7] While I differ in part on the interpretation of Rule 20, I agree with the Court of Appeal's disposition of the matter and would dismiss the appeal.

I. Facts

[8] More than a decade ago, a group of American investors, led by Fred Mauldin (the Mauldin Group), placed their money in the hands of Canadian "traders". Robert Hryniak was the principal of the company Tropos Capital Inc., which traded in bonds and debt instruments; Gregory Peebles, is a corporate-commercial lawyer (formerly of Cassels Brock & Blackwell) who acted for Hryniak, Tropos and Robert Cranston, formerly a principal of a Panamanian company, Frontline Investments Inc.

defendants, summary judgment would not serve the values of better access to justice, proportionality, and cost savings.

[20] Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that Hryniak had committed the tort of civil fraud against the Mauldin Group, and therefore dismissed Hryniak's appeal.

III. Outline

[21] In determining the general principles to be followed with respect to summary judgment, I will begin with the values underlying timely, affordable and fair access to justice. Next, I will turn to the role of summary judgment motions generally and the interpretation of Rule 20 in particular. I will then address specific judicial tools for managing the risks of summary judgment motions.

[22] Finally, I will consider the appropriate standard of review and whether summary judgment should have been granted to the respondents.

IV. Analysis

A. *Access to Civil Justice: A Necessary Culture Shift*

[23] This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

[24] However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available,[1] ordinary Canadians cannot afford to access the adjudication of civil disputes.[2] The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

[25] Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for

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[1] For instance, state funding is available in the child welfare context under *G. (J.)* orders even where legal aid is not available (see *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46), or for cases involving certain minority rights (see the Language Rights Support Program).

[2] In M. D. Agrast, J. C. Botero and A. Ponce, the 2011 *Rule of Law Index*, published by the World Justice Project, Canada ranked 9th among 12 European and North American countries in access to justice. Although Canada scored among the top 10 countries in the world in four rule of law categories (limited government powers, order and security, open government, and effective criminal justice), its lowest scores were in access to civil justice. This ranking is "partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases" (p. 23).

alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

[26] In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.

[27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

[28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The

proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[29] There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

[30] The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.[3] For example, Ontario Rules 1.04(1) and (1.1) provide:

> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[31] Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes . . . an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and

[3] This principle has been expressly codified in British Columbia, Ontario, and Quebec: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1-3(2); Ontario *Rules*, Rule 1.04(1.1); and *Code of Civil Procedure*, R.S.Q., c. C-25, art. 4.2. Aspects of Alberta's and Nova Scotia's rules of court have also been interpreted as reflecting proportionality: *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312, at para. 11; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371, at para. 12.

impact on the litigation, and its timeliness, given the nature and complexity of the litigation": *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53.

[32] This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

[33] A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

B. *Summary Judgment Motions*

[34] The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their

[51] Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

(2) The Interest of Justice

[52] The enhanced fact-finding powers granted to motion judges in Rule 20.04(2.1) may be employed on a motion for summary judgment unless it is in the "interest of justice" for them to be exercised only at trial. The "interest of justice" is not defined in the Rules.

[53] To determine whether the interest of justice allowed the motion judge to use her new powers, the Court of Appeal required a motion judge to ask herself "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?" (para. 50).

[54] The Court of Appeal identified the benefits of a trial that contribute to this full appreciation of the evidence: the narrative that counsel can build through trial, the ability of witnesses to speak in their own words, and the assistance of counsel in sifting through the evidence (para. 54).

[55] The respondents, as well as the interveners, the Canadian Bar Association, the Attorney General of Ontario and the Advocates' Society, submit that the Court of Appeal's emphasis on the virtues of the traditional trial is misplaced and unduly restrictive. Further, some of these interveners submit that this approach may result in the creation of categories of cases inappropriate for summary judgment, and this will limit the development of the summary judgment vehicle.

[56] While I agree that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, such an appreciation is not only available at trial. Focussing on how much and what kind of evidence could be adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers — and the purpose of the amendments — would be frustrated.

[57] On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and (2.2) can provide an equally valid, if less extensive, manner of fact finding.

[58] This inquiry into the interest of justice is, by its nature, comparative. Proportionality is assessed in relation to the full trial. It may require the motion judge to assess the relative efficiencies of proceeding by way of summary judgment, as opposed to trial. This would involve a comparison of, among other things, the cost and speed of both procedures. (Although summary judgment may be expensive and time consuming, as in this case, a trial may be even more expensive and slower.) It may also involve a comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it. (Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial.)

[59] In practice, whether it is against the "interest of justice" to use the new fact-finding powers will often coincide with whether there is a "genuine issue requiring a trial". It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

[60] The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may

run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

(3) The Power to Hear Oral Evidence

[61] Under Rule 20.04(2.2), the motion judge is given the power to hear oral evidence to assist her in making findings under Rule 20.04(2.1). The decision to allow oral evidence rests with the motion judge since, as the Court of Appeal noted, "it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed" (para. 60).

[62] The Court of Appeal suggested the motion judge should only exercise this power when

> (1) oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time;
>
> (2) any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and
>
> (3) any such issue is narrow and discrete — *i.e.*, the issue can be separately decided and is not enmeshed with other issues on the motion. [para. 103]

Federal Court | Cour fédérale

Date: 20090318

Dockets: IMM-2926-08
IMM-3045-08
IMM-326-09

Toronto, Ontario, March 18, 2009

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

Docket: IMM-2926-08

CHANTAL BAVUNU KRENA, KETSIA KRENA
and JODICK MOUDIANDAMBU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-3045-08

JANOS ROBERT GUNTHER, JANOSNE (MARIA) GUNTHER,
ANITA GUNTHER and MARIA GUNTHER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND
THE ATTORNEY GENERAL OF CANADA

Respondents

AND BETWEEN:

Docket: IMM-326-09

NELL TOUSSAINT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

UPON MOTION on behalf of the Proposed Intervener, Low Income Families Together (LIFT), filed February 16, 2009, pursuant to Rule 109 of the *Federal Courts Rules* for an Order granting leave to:

1. be added as an intervener in this judicial review;
2. file an additional affidavit of Anita Prasad, Secretary of the Board of Directors for LIFT and as an Exhibit the results and final report of the survey conducted by LIFT;
3. file written submissions before the hearing of the judicial review;
4. to participate in oral argument; and
5. such further Order(s) as this Court deems just.

AND UPON MOTION on behalf of the Proposed Intervener, Charter Committee on Poverty Issues (CCPI), filed February 20, 2009, pursuant to Rule 109 of the *Federal Courts Rules* for an order:

1. Granting leave to intervene;
2. Granting leave to file the affidavit of Bonnie Morton;
3. Granting leave to file a factum;
4. Granting leave to make oral argument; and
5. Such further or other orders as this Honourable Court may deem just.

AND UPON reading the Motion Records of the Proposed Interveners, the Respondent's Written Submissions, the Motion Record of the Applicants and upon hearing counsel for the parties and for the Proposed Interveners;

Both LIFT and CCPI seek to intervene in these proceedings on the ground that the issues raised in the proceedings raise issues of public interest. Both LIFT and CCPI have a long history of interventions in court proceedings affecting low income individuals and families. The issues in these proceedings deal with the waiver of fees to Applicants who filed Humanitarian and Compassionate Applications (H&C Applications) under *Immigration and Refugee Protection Act and Regulations* (IRPA).

The proposed intervention by CCPI will be confined to issues arising out of the requirement to pay fees to process H&C Applications for permanent residence pursuant to IRPA and the impact of such fees on persons living in poverty. Similarly, LIFT's proposed intervention will relate more specifically to the impact of the failure to waive fees on the best interests of children. Both Interveners will be raising arguments relating to s. 7 and 15 of the *Charter* as well as other arguments relating to patterns of discrimination and inequality, public policy concerns and competing demands on resources.

These motions are opposed by the Respondent who argues that to allow these Interveners to have standing will put the Court in the legislative role which has been reserved for Parliament. They also argue that it is duplicative for two Interveners to be permitted to intervene as they appear to raise similar arguments.

In my view, based on the very helpful submissions of counsel for the Interveners, the Applicant and counsel for the Respondent, this is one of those unique cases that raise issues of public policy, access to justice and discrimination and inequality that the Court will benefit from the participation of these organizations. As was noted in the Supreme Court of Canada in *Reference re: Workers Compensation Act* [1989] 2 SCR 335:

> ... public interest organizations are, as they should be, frequently granted intervener status. The views of interveners on issues of public importance frequently provide great assistance to the Courts.

The factors which are frequently considered on motions such as this are enumerated in *CUPE* v. *Canadian Airlines Limited* [2000] FCJ No. 220 at para. 8 wherein Mr. Justice Noël summarized the factors as follows:

1. Is the proposed intervener directly affected by the outcome?
2. Does there exist a justiciable issue and a veritable public interest?
3. Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
4. Is the position of the proposed intervener adequately defended by one of the parties to the case?
5. Are the interests of justice better served by the intervention of the proposed third party?
6. Can the Court hear and decide the cause on its merits without the proposed intervener?

I am satisfied that both proposed Interveners meet either all of the tests or substantially all of the tests. It has recently been held by Justice Mosley of this Court in *Khadar* v. *Attorney General* 2008 FC 807 at para. 42, that not all of the *CUPE* factors must be present or weigh in favour of the intervention before the Court may grant leave.

In my view, the issues raised in this proceeding and the participation of the proposed Interveners will not infringe on the role of Parliament. These types of issues frequently come before the Court for resolution. On matters of important public policy, Interveners such as LIFT and CCPI are precisely the type of parties who are able to assist the Court in dealing with the myriad of social policy and Charter issues which are raised. Further, based on the submissions of the parties it is my view that there will not be overlap, or significant overlap, between the proposed arguments of either CCPI or LIFT. From the submissions of LIFT it is apparent that they focus directly on the rights of children while CCPI is focused on the requirement of the payment of fees for H&C Applications

more generally. The positions which they will put forward will not replicate those of the Applicants. Thus, on balance, the proposed Interveners will be of assistance to the Court on these matters. Thus, both of the proposed Interveners, LIFT and CCPI, are granted standing to intervene in these proceedings on the terms set out below.

THIS COURT ORDERS that

1. Low Income Families Together (LIFT) and the Charter Committee on Poverty Issues (CCPI) are hereby granted standing to intervene in these proceedings.

2. The participation of CCPI is limited to the filing of a factum and oral argument at the hearing.

3. The participation of LIFT is limited to the filing of one affidavit, the filing of a factum and oral argument at the hearing.

4. The deponent of the affidavit filed by LIFT shall be subject to cross-examination if requested by the Respondent.

5. Neither LIFT nor CCPI shall seek costs of their respective participation in these proceedings and shall not be subject to a costs award.

6. Neither LIFT nor CCPI shall have a right of appeal from any decision arising from the hearing of these proceedings except as may be exercised by the Applicants.

7. Should further directions regarding the participation of LIFT and CCPI be required, the parties and the Interveners may contact the Court to arrange a case conference.

"Kevin R. Aalto"
Prothonotary

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140129

Docket: A-158-13

Citation: 2014 FCA 21

Present: **STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 29, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal Cour d'appel fédérale

Date: 20140129

Docket: A-158-13

Citation: 2014 FCA 21

Present: STRATAS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] Two motions to intervene in this appeal have been brought: one by the First Nations Child and Family Caring Society and another by Amnesty International.

[2] The appellant Attorney General opposes the motions, arguing that the moving parties have not satisfied the test for intervention under Rule 109 of the *Federal Courts Rules*, SOR/98-106. The respondents consent to the motions.

[3] Rule 109 provides as follows:

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109**. (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
(2) Notice of a motion under subsection (1) shall	(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	*a*) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	*b*) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.
(3) In granting a motion under subsection (1), the Court shall give directions regarding	(3) La Cour assortit l'autorisation d'intervenir de directives concernant :
(*a*) the service of documents; and	*a*) la signification de documents;
(*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	*b*) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[4] Below, I describe the nature of this appeal and the moving parties' proposed interventions in this appeal. At the outset, however, I wish to address the test for intervention to be applied in these motions.

[5] The Attorney General submits, as do the moving parties, that in deciding the motions for intervention I should have regard to *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 at paragraph 12 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.), an oft-applied authority: see, *e.g.*, *CCH Canadian Ltd. v. Law Society of Upper Canada* (2000), 189 D.L.R. (4th) 125 (F.C.A.). *Rothmans, Benson & Hedges* instructs me that on these motions a list of six factors should guide my discretion. All of the factors need not be present in order to grant the motions.

[6] In my view, this common law list of factors, developed over two decades ago in *Rothmans, Benson & Hedges*, requires modification in light of today's litigation environment: *R. v. Salituro*, [1991] 3 S.C.R. 654. For the reasons developed below, a number of the *Rothmans, Benson & Hedges* factors seem divorced from the real issues at stake in intervention motions that are brought today. *Rothmans, Benson & Hedges* also leaves out other considerations that, over time, have assumed greater prominence in the Federal Courts' decisions on practice and procedure. Indeed, a case can be made that the *Rothmans, Benson & Hedges* factors, when devised, failed to recognize the then-existing understandings of the value of certain interventions: Philip L. Bryden, "Public Intervention in the Courts" (1987) 66 Can. Bar Rev. 490; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 U. T. Fac. L. Rev. 151. Now is the time to tweak the *Rothmans, Benson & Hedges* list of factors.

[7] In these reasons, I could purport to apply the *Rothmans, Benson & Hedges* factors, ascribing little or no weight to individual factors that make no sense to me, and ascribing more weight to

others. That would be intellectually dishonest. I prefer to deal directly and openly with the *Rothmans, Benson & Hedges* factors themselves.

[8] In doing this, I observe that I am a single motions judge and my reasons do not bind my colleagues on this Court. It will be for them to assess the merit of these reasons.

[9] The *Rothmans, Benson & Hedges* factors, and my observations concerning each, are as follows:

- *Is the proposed intervener directly affected by the outcome?* "Directly affected" is a requirement for full party status in an application for judicial review – *i.e.*, standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236. All other jurisdictions in Canada set the requirements for intervener status at a lower but still meaningful level. In my view, a proposed intervener need only have a genuine interest in the precise issue(s) upon which the case is likely to turn. This is sufficient to give the Court an assurance that the proposed intervener will apply sufficient skills and resources to make a meaningful contribution to the proceeding.

- *Does there exist a justiciable issue and a veritable public interest?* Whether there is a justiciable issue is irrelevant to whether intervention should be granted. Rather, it is relevant to whether the application for judicial review should survive in the first place. If there is no justiciable issue in the application for judicial review, the issue is

not whether a party should be permitted to intervene but whether the application should be struck because there is no viable administrative law cause of action: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250.

- *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* This is irrelevant. If an intervener can help and improve the Court's consideration of the issues in a judicial review or an appeal therefrom, why would the Court turn the intervener aside just because the intervener can go elsewhere? If the concern underlying this factor is that the intervener is raising a new question that could be raised elsewhere, generally interveners – and others – are not allowed to raise new questions on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paragraphs 22-29.

- *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.

- *Are the interests of justice better served by the intervention of the proposed third party?* Again, this is relevant and important. Sometimes the issues before the Court

assume such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties who happen to be before the Court. Sometimes that broader exposure is necessary to appear to be doing – and to do – justice in the case.

- *Can the Court hear and decide the case on its merits without the proposed intervener?* Almost always, the Court can hear and decide a case without the proposed intervener. The more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter.

[10] To this, I would add two other considerations, not mentioned in the list of factors in *Rothmans, Benson & Hedges*:

- *Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"?* For example, some motions to intervene will be too late and will disrupt the orderly progress of a matter. Others, even if not too late, by their nature may unduly complicate or protract the proceedings. Considerations such as these should now pervade the interpretation and application of procedural rules: *Hryniak v. Mauldin*, 2014 SCC 7.

- *Have the specific procedural requirements of Rules 109(2) and 359-369 been met?*

  Rule 109(2) requires the moving party to list its name, address and solicitor, describe how it intends to participate in the proceeding, and explain how its participation "will assist the determination of a factual or legal issue related to the proceeding." Further, in a motion such as this, brought under Rules 359-369, moving parties should file detailed and well-particularized supporting affidavits to satisfy the Court that intervention is warranted. Compliance with the Rules is mandatory and must form part of the test on intervention motions.

[11] To summarize, in my view, the following considerations should guide whether intervener status should be granted:

I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

[12] In my view, these considerations faithfully implement some of the more central concerns that the *Rothmans, Benson & Hedges* factors were meant to address, while dealing with the challenges that regularly present themselves today in litigation, particularly public law litigation, in the Federal Courts.

[13] I shall now apply these considerations to the motions before me.

– I –

[14] The moving parties have complied with the specific procedural requirements in Rule 109(2). This is not a case where the party seeking to intervene has failed to describe with sufficient particularity the nature of its participation and how its participation will assist the Court: for an example where a party failed this requirement, see *Forest Ethics Advocacy Association*, *supra* at paragraphs 34-39. The evidence offered is particular and detailed, not vague and general. The evidence satisfactorily addresses the considerations relevant to the Court's exercise of discretion.

– II –

[15] The moving parties have persuaded me that they have a genuine interest in the matter before the Court. In this regard, the moving parties' activities and previous interventions in legal and policy matters have persuaded me that they have considerable knowledge, skills and resources relevant to the questions before the Court and will deploy them to assist the Court.

– III –

[16] Both moving parties assert that they bring different and valuable insights and perspectives to the Court that will further the Court's determination of the appeal.

[17] To evaluate this assertion, it is first necessary to examine the nature of this appeal. Since this Court's hearing on the merits of the appeal will soon take place, I shall offer only a very brief, top-level summary.

[18] This appeal arises from the Federal Court's decision to quash Aboriginal Affairs and Northern Development Canada's refusal to grant a funding request made by the respondent Band Council: *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342. The Band Council requested funding to cover the expenses for services rendered to Jeremy Meawasige and his mother, the respondent Maurina Beadle.

[19] Jeremy is a 17-year-old disabled teenager. His condition requires assistance and care 24 hours a day. His mother served as his sole caregiver. But in May 2010 she suffered a stroke. After that, she could not care for Jeremy without assistance. To this end, the Band provided funding for Jeremy's care.

[20] Later, the Band requested that Canada cover Jeremy's expenses. Its request was based upon *Jordan's Principle*, a resolution passed by the House of Commons. In this resolution, Canada announced that it would provide funding for First Nations children in certain circumstances. Exactly what circumstances is very much an issue in this case.

[21] Aboriginal Affairs and Northern Development Canada considered this funding principle, applied it to the facts of this case, and rejected the Band Council's request for funding. The

respondents successfully quashed this rejection in the Federal Court. The appellant has appealed to this Court.

[22] The memoranda of fact and law of the appellant and the respondents have been filed. The parties raise a number of issues. But the two key issues are whether the Federal Court selected the correct standard of review and, if so, whether the Federal Court applied that standard of review correctly.

[23] The moving parties both intend to situate the funding principle against the backdrop of section 15 Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters. Although the appellant and the respondents do touch on some of this context, in my view the Court will be assisted by further exploration of it.

[24] This further exploration of contextual matters may inform the Court's determination whether the standard of review is correctness or reasonableness. It will be for the Court to decide whether, in law, that is so and, if so, how it bears upon the selection of the standard of review.

[25] The further exploration of contextual matters may also assist the Court in its task of assessing the funding principle and whether Aboriginal Affairs was correct in finding it inapplicable or was reasonable in finding it inapplicable.

[26] If reasonableness is the standard of review, the contextual matters may have a bearing upon the range of acceptable and defensible options available to Aboriginal Affairs. The range of

acceptable and defensible options takes its colour from the context, widening or narrowing depending on the nature of the question and other circumstances: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 37-41 and see also *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at paragraph 22, *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50, and *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14. In what precise circumstances the range broadens or narrows is unclear – at this time it cannot be ruled out that the contextual matters the interveners propose to raise have a bearing on this.

[27] In making these observations, I am not offering conclusions on the relevance of the contextual matters to the issues in the appeal. In the end, the panel determining this appeal may find the contextual matters irrelevant to the appeal. At present, it is enough to say that the proposed interveners' submissions on the contextual matters they propose to raise – informed by their different and valuable insights and perspectives – will actually further the Court's determination of the appeal one way or the other.

– IV –

[28] Having reviewed some of the jurisprudence offered by the moving parties, in my view the issues in this appeal – the responsibility for the welfare of aboriginal children and the proper interpretation and scope of the relevant funding principle – have assumed a sufficient dimension of public interest, importance and complexity such that intervention should be permitted. In the

circumstances of this case, it is in the interests of justice that the Court should expose itself to perspectives beyond those advanced by the existing parties before the Court.

[29] These observations should not be taken in any way to be prejudging the merits of the matter before the Court.

– V –

[30] The proposed interventions are not inconsistent with the imperatives in Rule 3. Indeed, as explained above, by assisting the Court in determining the issues before it, the interventions may well further the "just…determination of [this] proceeding on its merits."

[31] The matters the moving parties intend to raise do not duplicate the matters already raised in the parties' memoranda of fact and law.

[32] Although the motions to intervene were brought well after the filing of the notice of appeal in this Court, the interventions will, at best, delay the hearing of the appeal by only the three weeks required to file memoranda of fact and law. Further, in these circumstances, and bearing in mind the fact that the issues the interveners will address are closely related to those already in issue, the existing parties will not suffer any significant prejudice. Consistent with the imperatives of Rule 3, I shall impose strict terms on the moving parties' intervention.

[33] In summary, I conclude that the relevant considerations, taken together, suggest that the moving parties' motions to intervene should be granted.

[34] Therefore, for the foregoing reasons, I shall grant the motions to intervene. By February 20, 2014, the interveners shall file their memoranda of fact and law on the contextual matters described in these reasons (at paragraph 23, above) as they relate to the two main issues before the Court (see paragraph 22, above). The interveners' memoranda shall not duplicate the submissions of the appellant and the respondents in their memoranda. The interveners' memoranda shall comply with Rules 65-68 and 70, and shall be no more than ten pages in length (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover). The interveners shall not add to the evidentiary record before the Court. Each intervener may address the Court for no more than fifteen minutes at the hearing of the appeal. The interveners are not permitted to seek costs, nor shall they be liable for costs absent any abuse of process on their part. There shall be no costs of this motion.

"David Stratas"

J.A.

Federal Court of Appeal | Cour d'appel fédérale

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-158-13

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v. PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: STRATAS J.A.

DATED: JANUARY 29, 2014

WRITTEN REPRESENTATIONS BY:

Jonathan D.N. Tarlton Melissa Chan	FOR THE APPELLANT
Justin Safayeni Kathrin Furniss	FOR THE PROPOSED INTERVENER, AMNESTY INTERNATIONAL
Katherine Hensel Sarah Clarke	FOR THE PROPOSED INTERVENER, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

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COURT OF APPEAL FOR ONTARIO

DATE: 20140331
DOCKET: M43540, M43549, M43525, M43545, M43551, M43534, M43547 (C57714)

Feldman J.A. (In Chambers)

BETWEEN

Jennifer Tanudjaja, Janice Arsenault, Ansar Mahmood, Brian Dubourdieu, Centre for Equality Rights in Accommodation

Applicants (Appellants)

and

The Attorney General of Canada and The Attorney General of Ontario

Respondents (Respondents)

Peter Rosenthal and Tracy Heffernan, for the appellants

Gail Sinclair and Michael H. Morris, for The Attorney General of Canada

Janet E. Minor and Shannon Chace, for The Attorney General of Ontario

Cheryl Milne, for the Asper Centre for Constitutional Rights

Molly Reynolds and Ryan Lax, for Amnesty International Canada and the International Network for Economic, Social and Cultural Rights

Martha Jackman and Benjamin Ries, for the Charter Committee on Poverty Issues, Pivot Legal Society and Justice for Girls

Marie Chen, for the Income Security Advocacy Centre, the ODSP Action Coalition and the Steering Committee on Social Assistance

Renée Lang, for ARCH Disability Law Centre, The Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario

Margaret Flynn, for the Ontario Human Rights Commission

Mary Eberts and Avvy Go, for Colour of Poverty/Colour of Change Network

Vasuda Sinha, Rahool Agarwal and Lauren Posloski, for the Women's Legal Education and Action Fund Inc.

Heard: March 28, 2014

ENDORSEMENT

[1] These are motions brought under rule 13.02 of the *Rules of Civil Procedure* by eight organizations or coalitions of organizations for leave to intervene in the appeal of this matter, which was a judgment made on two Rule 21 motions. The judgment below struck out the claims contained in the Amended Notice of Application as disclosing no reasonable cause of action: *Tanudjaja v. Attorney General (Canada) (Application),* 2013 ONSC 5410. Three of the proposed interveners were granted leave to intervene on the motions below, and the appellants and respondents consent to their intervention on the appeal (on terms). The appellants consent to the intervention of the other five proposed interveners, while the two respondents oppose their intervention.

[2] The appeal is scheduled to be heard on May 26 and 27, 2014. The appellants filed their factum on November 7, 2013 and the respondents filed their factums on January 20, 2014 (Attorney General of Canada) and February 3, 2014 (Attorney General of Ontario).

[3] I was designated by Hoy A.C.J.O. to hear and determine these motions to intervene.

[4] The application that is the subject of the appeal is brought by four individuals and an organization devoted to human rights and equality rights in housing. The application seeks a number of declarations against both levels of government, stating that they have failed to adequately address the problems of homelessness and inadequate housing, contrary to ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms.* The application also seeks as a remedy an order that the two levels of government "must implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing..."

[5] The respondents brought motions under Rule 21 of the *Rules of Civil Procedure* to strike out the claims in the application as disclosing no reasonable cause of action. The motion judge granted the motions and struck out the claims. The issue on the appeal is whether the motion judge erred in striking out the claims. It is not an appeal of the merits of the application. The motion judge considered only the pleadings as contained in the Amended Notice of Application; he did not read or consider the affidavits on which the application was based.

[6] On a motion to intervene in a *Charter* case, the onus on the moving party is more relaxed than in private law cases. The moving party usually must show that it meets at least one of the following three criteria: a) that it has a real, substantial and identifiable interest in the subject matter of the proceedings, b) that it has an important perspective distinct from the immediate parties, or c) that it is a well-recognized group with a special expertise and a broadly identifiable membership base. The proposed intervener must also show that it will make a useful contribution that outweighs any prejudice to the parties. See: *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), at p. 167; *Bedford v. Canada (Attorney General)*, 2009 ONCA 669, 98 O.R. (3d) 792, at para. 2.

[7] The eight proposed interveners are the following:

1. a coalition of the Charter Committee on Poverty, Pivot Legal Society and Justice for Girls (the Charter Committee Coalition);

2. a coalition of Amnesty International Canada and the International Network for Economic, Social and Cultural Rights (the Amnesty Coalition);

3. the David Asper Centre for Constitutional Rights (the Asper Centre);

4. a coalition of ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario (the ARCH Coalition);

5. a coalition of the Income Security Advocacy Centre, the ODSP Action Coalition and the Steering Committee on Social Assistance (the Income Security Coalition);

6. the Colour of Poverty/Colour of Change Network (COPC);

7. the Ontario Human Rights Commission (OHRC); and

8. the Women's Legal Education and Action Fund Inc. (LEAF).

[8] Each proposed intervener filed a factum on this intervention motion and each made oral submissions as well, addressing the contribution they intend to make and how their submissions will differ in some respect from those of the appellants and from those of the other proposed interveners. As stated above, the appellants consent to all of the intervention motions. The respondents consent to the first three listed above, but oppose the intervention of the remaining five. They submit that the interveners will not add anything new to the submissions of the appellants or the submissions of the three proposed interveners to which they consent (the Charter Committee Coalition, the Amnesty Coalition and the Asper Centre).

[9] In my view, each of the interveners meets the test for the purposes of this appeal. I am satisfied that it would assist this court to have before it the different perspectives offered by these organizations. Although the appeal is not on the full merits of the *Charter* claims, because the court will consider the scope of

relief that may or may not be available under the *Charter,* taking the factual allegations in the amended application as true, the decision may discuss the extent of *Charter* rights regarding housing and homelessness in Canada. Each of the proposed organizations and their constituencies have a significant interest in what the court may say in the course of that discussion, as well as in the outcome of the appeal.

[10] The interveners are comprised of long-standing and respected organizations with valuable expertise in the areas of human rights, equality rights, constitutional law and poverty law as well as homelessness. I am satisfied that each intervener will make a useful contribution to the appeal by framing the argument from the perspective of their constituencies, and by including submissions on the potential effects on those constituencies of the different orders that the court may make.

[11] Counsel for the Attorney General of Canada expressed concern about certain international documents that the appellants and some of the interveners seek to bring to the attention of the court. The Attorney General of Canada asserts that some or all of these documents are evidence and are not properly before the court and that it will be prejudiced by having to respond to them at this stage of the proceedings. The affected interveners have assured the court that they will not refer to any document that has not already been referenced by the appellants in their factum, or discussed by the Supreme Court of Canada or this

court in other cases. It will be up to the panel hearing this appeal to decide whether it will consider any of these documents on the appeal.

Result

[12] Each of the applicants for intervener status is granted that status for the purpose of the appeal. Each may file a factum of a maximum length of 15 pages in prescribed Court of Appeal form. Each will also have 10 minutes to address the court. The appeal will now be scheduled to continue on the morning of May 28. The respondents may each file a factum responding to the interveners, if necessary, to a total maximum of 30 pages. The interveners' factums are to be filed by April 15, 2014 and the responding factums by May 2, 2014. As discussed during the hearing, the interveners may not raise arguments that seek to amend or modify the claims asserted by the appellants in their Amended Notice of Application.

K. Feehan J.A.

FEDERAL COURT OF APPEAL

BOOK OF AUTHORITIES OF THE PROPOSED INTERVENERS THE CHARTER COMMITTEE ON POVERTY ISSUES AND THE CANADA HEALTH COALITION

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